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SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940*

Charles W. Taintor, II†

A. B. Butts‡

The Soldiers' and Sailors' Civil Relief Act of 1940 was approved October 27, 1940.[1] It is entitled:

> "*AN ACT* to promote and strengthen the national defense by suspending enforcement of certain civil liabilities of certain persons serving in the Military and Naval Establishments, including the Coast Guard."[2]

Provision is made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in the military service of the Nation "in order to enable such persons to devote their entire energy to the defense needs of the Nation."[3]

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*Bibliography: 1940 Act; Bendetson, *A Discussion of the Soldiers' and Sailors' Civil Relief Act of 1940* (1940) 2 WASH. & LEE L. REV. 1; Muench, *Soldiers' and Sailors' Civil Relief Act of 1940* (1940) 6 J. MARSH. L. Q. 190; Notes (1941) 29 GEO. L. J. 748, (1941) N. Y. U. L. Q. REV. 302, (1941) 16 TENN. L. REV. 866, (1941) 27 VA. L. REV. 207, (1940) 50 YALE L. J. 250, 259. 1918 Act: DUNHAM, MORATORY LEGISLATION IN THE UNITED STATES (1917) 9-19; Ferry, Rosenbaum, and Wigmore, *The Soldiers' and Sailors' Civil Rights Bill* (1918) 12 ILL. L. REV. 449, also in (1918) 3 MASS. L. Q. 204; Notes (1918) 29 AM. LEG. 9, (1918) 50 CHIC. LEG. N. 291, (1918) 4 MASS. L. Q. 31, (1918) 3 MASS. L. Q. 189, (1919) 23 LAW NOTES 145, (1920) 4 MINN. L. REV. 353, (1918) 4 VA. L. REG. (N.S.) 323, (1918) 27 YALE L. J. 802, (1918) 46 WASH. L. REP. 196.

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[1]Public, No. 861, 76th Congress, 54 STAT. 1178 *et seq.* (1940), 50 U.S.C.A. §§ 501 *et seq.* (Supp. 1941). It is provided in the enacting clause that this Act "may be cited as the Soldiers' and Sailors' Civil Relief Act of 1940."

[2]Compare the SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1918 [40 STAT. 440 (1918), 50 U.S.C.A. Appendix § 101 (Supp. 1940)]: "An Act to extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war."

[3]SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 § 100.

Persons Affected

By the terms of the Act "persons in military service" include the following persons and no others: "All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all Officers of the Public Health Service detailed by proper authority for duty either with the Army or Navy."[4]

By statute,[5] the Army of the United States consists of (a) the Regular Army, (b) the National Guard of the United States,[6] (c) the National Guard while in the service of the United States, (d) the Officers' Reserve Corps, (e) the Organized Reserves, and (f) the Enlisted Reserve Corps.

By statute,[7] the United States Navy includes (a) the Regular Navy, (b) the Naval Reserves, which includes the Fleet Reserve, the Organized Reserve, the Merchant Marine Reserve, and the Volunteer Reserve.[8] The Marine Corps, under the supervision and direction of the Navy Department, includes the Regular Marine Corps and a Marine Corps Reserve.[9]

Selectees under the Selective Training and Service Act, when inducted into the land or naval forces,[10] become immediately "persons in military service" under the terms of the Act.[11]

A person who is accepted for military service but not yet inducted into the service, is not protected by the provisions of the Act.[12] Nor do the provisions thereof apply to a person in his representative capacity as

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[4]*Id.* § 101(1).

[5]National Defense Act, June 3, 1916, § 1, [39 Stat. 166 (1916), 10 U.S.C.A. § 602 (1927)], *as amended* June 4, 1920, [41 Stat. 759 (1920), 10 U.S.C.A. § 602 (Supp. 1940)], *as amended* June 15, 1933, [48 Stat. 153 (1933), 10 U.S.C.A. § 2 (Supp. 1940)].

[6]Organized by congress to be available for other purposes than those enumerated in the Constitution for the calling out of the Militia under U. S. Const. Art. I, § 8(15), which includes only "to execute the Laws of the Union, suppress Insurrections and repel Invasions."

[7]See 34 U.S.C.A. cc. 1 & 2 *et seq.* (1940); Naval Reserve Act, June 25, 1938, [52 Stat. 1175 (1938), 34 U.S.C.A. § 853 (Supp. 1940)].

[8]The Volunteer Reserve of the Naval Reserve includes female registered nurses appointed by the Secretary of the Navy, 52 Stat. 1176 (1938), 34 U.S.C.A. § 853b (Supp. 1940).

[9]52 Stat. 1175 (1938), 34 U.S.C.A. § 853a (Supp. 1940).

[10]54 Stat. ____ (1940), 50 U.S.C.A.§ 301 *et seq.* (Supp. 1940).

[11]Soldiers' and Sailors' Civil Relief Act of 1940 § 101(1). Hereinafter the Soldiers' and Sailors' Civil Act of 1940 will be cited as "S&S Act."

[12]Continental Jewelry Co. v. Minsky, 119 Me. 475, 111 Atl. 801 (1920). The S&S Act does not apply to protect a person who is the captain of a vessel carrying soldiers and munitions of war, since he is not engaged in service specified in the Act. Greenwood v. Puget Mill Co., 111 Wash. 464, 191 Pac. 393 (1920).

executor of a decedent.[13] The Act applies to natural persons only; and a corporation is not protected thereby from the effect of a statute of non-claim, though the officer and local manager of the corporation, who conducted the negotiations out of which grew the corporation's claim and who should have filed that claim against the defendant estate, have been inducted into the military service before the running of the non-claim statute.[14] A corporation may, however, receive an incidental protection from the Act where, but for the protection given to its employee by the Act, the corporation would be entitled to rely on a judgment against it as conclusive or *prima facie* evidence of its right to recover over against the employee where it had been compelled to respond in damages solely upon the ground of *respondeat superior*.[15]

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[13]Thus where state statute allows an executor to revive his decedent's action at the second term of court after her death, and also provides that any person interested in an estate may bring an action which the executor declines or fails to prosecute, or may sue if no executor is appointed, the S&S Act does not protect the husband of the decedent in his capacity as executor, but does protect him with respect to his personal right to sue. It might be that the husband would be required to bring the action in his own name as executor, but the recovery would be limited to his personal interest. If, for instance, the husband suing as executor could have recovered the total of his wife's claim for $1000, when he sues under the protection of the S&S Act and is entitled as distributee to one-half of his wife's estate, his recovery in his own name as executor will be limited to $500. Halle v. Cavanaugh, 79 N. H. 418, 111 Atl. 76, (1920).

[14]Bolz Cooperage Corp. v. Beardslee, 211 Mo. App. 109, 245 S.W. 611 (1922).

[15]Ilderton v. Charleston Consol. R. & L. Co., 113 S. C. 91, 101 S.E. 282 (1919). In this case the soldier had been motorman for defendant corporation, and it was upon his alleged negligence that the plaintiff's cause of action was predicated. At the time of the trial of the action against the corporation, with which the motorman was not joined as defendant, the employee was in France. He had told the defense attorneys that he would testify that the plaintiff ran in front of the car which he was driving slowly and carefully, and that the accident was unavoidable. The court said that in the normal case the corporation could have vouched the motorman to defend the suit, in which case judgment against the former would have been binding on the latter in a later action for indemnification; and that if the corporation did not vouch the motorman to defend, the judgment against it would normally be conclusive as to the amount it had been compelled to pay and would have been *prima facie* evidence of the liability of the servant to his master. It was said that the S&S Act would protect the servant as to his liability over, and that it would be unjust to the corporation to allow judgment to go against it and then deny it the force and effect to which the corporation would normally be entitled. The court refused to consider the factual improbability of action over against the servant, but said that it would consider the legal situation only.

The other ground of decision is doubtful. This was that the trial judge abused his discretion through error of law, in that he believed, as he said to the jury in answer to a request for special instruction, that "nothing that you do here would bind the motorman, because he is not a party to the suit." The South Carolina Supreme Court said that the judgment against the corporation would have affected the motorman in a possible action for his liability over. It is difficult to understand how he could have been affected by the judgment, when direct protection of him by the S&S Act was considered; and at the same time protected by the Act, when detriment to the corporation was considered as set forth above.

It seems, rather, that he would have been affected by the judgment, in which case the trial judge should have exercised his discretion and allowed a continuance under Section 201 of the 1918 S&S Act (1940 S&S Act, § 201); or he would not have

Courts Affected

In the administration of the Act, all courts of competent jurisdiction of the United States or of any State, whether or not courts of record, are clothed with authority by the specific terms of the Act.[16] The provisions of the Act apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, "and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may by them be prescribed."[17] When under the terms of the Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court.[18]

The Act does not purport to make any change in the jurisdiction of any court created under State authority and a justice of the peace has, in his court, the discretion given courts under the terms of the Act.[19] It has even been said that the section of the 1918 Act providing for exclusion of the period of military service from the periods of statutes of limitations would apply in State courts even in the absence of the section making it applicable to such courts.[20]

Effect in State Courts of Analogous State Statutes

Though there has been no serious attack on the constitutionality of the Federal Soldiers' and Sailors' Civil Relief Acts, several courts have asserted the constitutionality of the 1918 Act[21] under the powers to raise and support armies,[22] and to maintain a navy,[23] and under the "war" power.[24]

A more serious question is the constitutionality and effect of State statutes enacted to protect the rights of soldiers and sailors. In some cases courts have assumed the validity of such State statutes, without

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been affected by the judgment, in which case the trial court should have exercised his discretion to grant a continuance on the ground of unfairness to the corporate defendant, or should in discretion have refused a continuance.

As to protection of persons who are joint defendants with other persons who are in the military service see discussion of Section 204, notes 101 and 113 *infra*.

[16]S&S Act § 101(4).

[17]*Id.* § 102(1).

[18]*Id.* § 102(2).

[19]Riordan v. Zube, 50 Cal. App. 22, 195 Pac. 65 (1921).

[20]Bell v. Baker, 260 S.W. 158 (Tex. Comm. App. 1924).

[21]40 Stat. 440 (1918), 50 U.S.C.A. Appendix § 101 (Supp. 1940). In Ebert v. Poston, 266 U. S. 548, 45 Sup. Ct. 188, 69 L. ed. 435 (1925) the question of constitutionality was not before the Supreme Court.

[22]U. S. Const. Art. I, § 8(12).

[23]*Id.* Art. I, § 8(13).

[24]*Id.* Art. I. § 8(11).

mention of the 1918 Act,[25] provided, of course, that the statutes applied only to procedure[26] and not to impair vested rights or the obligation of contract.[27] An evident desire to protect persons in military service has, in fact, led to somewhat doubtful construction of such a statute as applying only to assertion of a right of entry in court and not to assertion of such a right *in pais*.[28]

In only two cases, *Konkel v. State*,[29] and *Pierrard v. Hoch*,[30] was the opinion directed to a careful consideration of the constitutionality of State statutes which overlapped the field covered by the Federal Soldiers' and Sailors' Civil Relief Act of 1918. In both cases the final decision[31] was that State wartime moratory legislation is unconstitutional if it conflicts with such legislation by Congress.

In *Konkel v. State* the Wisconsin Supreme Court set out three categories of legislative action: (1) Legislation in fields in which the States have plenary power, and Congress no right to interfere; (2) Legislation in fields of concurrent jurisdiction and in which the States may act, but may not enact statutes conflicting with federal statutes; and (3) Legislation in fields in which Congressional legislative power is exclusive, and in which States may not act, even though Congress has not legislated. The court concluded that the type of legislation under discussion was to be allocated to the second category; and that the Wisconsin moratory statute was superseded by the 1918 Soldiers' and Sailors' Civil Relief Act in so far as there was conflict; that the federal and State statutes spoke upon the same subject matter, the exemption of persons in military service from civil process; that the periods of exemption were different; and that, therefore, the period prescribed by the federal statute must alone be considered.

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[25]Crenshaw v. Granet, 237 Mich. 367, 211 N.W. 636 (1927); Strand v. Larson, 45 N. D. 7, 176 N.W. 736 (1920); Thress v. Zemple, 42 N. D. 599, 174 N.W. 85 (1919); 9 A. L. R. 1 (1920). In other cases the S&S Act is mentioned but held not to conflict with the State statute. Austby v. Yellowstone Mtge. Co., 63 Mont. 444, 207 Pac. 631 (1922); Olson v. Gowan Lenning Brown Co., 47 N. D. 544, 182 N.W. 929 (1921). In Strand v. Larson, *supra*, Robinson, J., dissented on the ground that the S&S Act abrogated the State statute.

[26]Austby v. Yellowstone Valley Mtge. Co., 63 Mont. 444, 207 Pac. 631 (1922); Daron v. Prudential Ins. Co., 26 Dist. R. 691 (Pa. 1917); Granger v. Luther, 42 S. D. 636, 176 N.W. 1019 (1920) (S. D. Laws 1918, c. 5, § 2, held constitutional as it suspends only actions, not rights, though perhaps abrogated by the S&S Act).

[27]Thress v. Zemple, 42 N. D. 599, 174 N.W. 85 (1919), 9 A. L. R. 1 (1920); Granger v. Luther, 42 S. D. 636, 176 N.W. 1019 (1920) (S. D. Laws 1918, c. 5, § 1, said to be unconstitutional as it purports to suspend rights, not merely remedies); see Pierrard v. Hoch, 97 Ore. 71, 191 Pac. 328 (1920).

[28]Granger v. Luther, 42 S. D. 636, 176 N.W. 1019 (1920).

[29]168 Wis. 335, 170 N.W. 715 (1919).

[30]97 Ore. 71, 191 Pac. 328 (1920), *reversing*, 97 Ore. 71, 184 Pac. 494 (1920).

[31]The decision in Pierrard v. Hoch, 97 Ore. 71, 191 Pac. 328 (1920) was on rehearing, and reversed the first decision.

Rosenberry, J., speaking for the majority, based the decision on the ample justice done by the federal statute and on the statement that: "The orderly administration of the Army and Navy require that such regulations be uniform. The military and administrative officers of the United States ought not to be required to look into the statute books of 48 separate states to determine what the privileges and immunities of United States soldiers are."[32] Owen, J., dissented on the ground that this was "a voluntary and unnecessary surrender of a sovereign power." His position was that the power delegated to the United States is a war and military power,[33] and that:

> "The respective interests of the state and federal governments in this subject are by no means identical. The purposes to be attained are quite different. The federal government is interested in the individual in his capacity as a soldier; the state is interested in him in his capacity as a citizen. It seems self-evident that the consideration which a state may extend to its citizens in this respect is not limited by the military necessities of the federal government. . . . Congress simply demanded such immunity as was required by its military exigencies, and, in my opinion, had no power to demand any more. The granting of further relief on the part of the states was of no concern to Congress."[34]

He was, further, of the opinion that the federal statute should not be construed as intended to be exclusive, whether the above considerations were valid or not, unless that intention was clearly manifested.[35]

In *Pierrard v. Hoch* there was no dissent to the opinion of Benson, J., at the first hearing[36] to the effect that "it is difficult to conceive of a federal act possessing superiority to state legislation upon the subject of remedies and procedure in the state courts." But, on rehearing,[37] this opinion was withdrawn and there was no dissent to the decision that the case was to be distinguished from others in which the federal legislation left uncovered the whole field or a part thereof,[38] and that the invalidity or the suspension of the state statute resulted "because the two enactments are incompatible with each other. The state law forbids all action, while the national law countenances action under circumstances more or less

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[32]Konkel v. State, 168 Wis. 335, 170 N.W. 715, 718 (1919).
[33]U. S. CONST. Art. 1, § 8(11)-(16).
[34]Konkel v. State, 168 Wis. 335, 170 N.W. 715, 718 (1919).
[35]Reid v. Colorado, 187 U. S. 137, 23 S. Ct. 92, 47 L. ed. 108 (1902).
[36]97 Ore. 71, 184 Pac. 494 (1920).
[37]97 Ore. 71, 191 Pac. 328 (1920).
[38]See also Austby v. Yellowstone Valley Mtge. Co., 63 Mont. 444, 207 Pac. 631 (1922); Olson v. Gowan Lenning Brown Co., 47 N. D. 544, 182 N.W. 929 (1921); Strand v. Larson, 45 N. D. 7, 176 N.W. 736, 9 A. L. R. 1 (1920); Granger v. Luther, 42 S. D. 636, 176 Pac. 1019 (1920).

favorable to the military defendant." It was suggested that a reason for this result might be that uniform legislation improves morale by giving identical immunities to all soldiers and sailors, and that there might be dissatisfaction if there were variation by States.

In so far as the constitutionality of the Soldiers' and Sailors' Civil Relief Act of 1940 is concerned, there seems to be no doubt: it is constitutional. Though it is unnecessary that it be confined to suspension of remedies, as only the States are forbidden to enact laws impairing the obligations of contracts,[39] the Act purports only to suspend the enforcement of civil liabilities, and wartime moratory legislation has been held constitutional at various times.[40]

The effect of State statutes covering the same field, or part of the same field, as the federal legislation is more doubtful. As shown above, the only two cases directed to the question have reached the result that inconsistent State legislation is either invalid or suspended during the period covered by the federal legislation. However, one swallow does not make a summer, nor do two cases establish a settled course of decision, especially where the reasoning of the two opinions may be unacceptable. It becomes necessary, therefore, to examine in detail the reasoning of the Supreme Courts of Wisconsin and Oregon in *Konkel v. State* and *Pierrard v. Hoch*. In the former, the majority of the court relied heavily on the statement that orderly military administration requires that regulation of the privileges and immunities of persons in military service be uniform, in order that the military and administrative officers of the United States need not consider the possible 48 different State schemes of immunity.[41]

It is submitted that this fear of inconvenience to the officers of the United States is unreal. In the first place, neither the administrative nor

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[39]U. S. CONST. Art. I, § 10(1).

[40]*War of 1812:* Johnson v. Duncan, 3 Mart. 350 (La. 1815); *Civil War:* Stewart v. Kahn, 11 Wall. 493 (U. S. 1871); Mister v. McLean (43 Miss. 268 (1879); Buchanan v. Smith, 43 Miss. 90 (1870); Hill v. Boyland, 40 Miss. 618 (1866); *World War:* Clark v. Mechanics' Am. Nat. Bk., 282 Fed. 589 (C.C.A. 8th, 1922); Wenatchee Produce Co. v. Great Northern Ry., 271 Fed. 784 (E. D. Wash. 1921); Hoffman v. Charlestown Bk., 231 Mass. 324, 121 N.E. 15 (1918); Pierrard v. Hoch, 97 Ore. 71, 191 Pac. 328 (1920); Granger v. Luther, 42 S. D. 636, 176 N.W. 1019 (1920); Bell v. Baker, 260 S.W. 158 (Tex. Comm. App. 1924); Kuehn v. Neugebauer, 216 S.W. 259 (Tex. Civ. App. 1919); Konkel v. State, 168 Wis. 335, 170 N.W. 715 (1919).

While the S&S Act of 1940 may not be valid under the War powers, since no declaration of war had been made at the time of its enactment, it is undoubtedly valid under the powers to raise and maintain an Army and Navy, particularly in this time of emergency; and it is probable that State moratory legislation at this time would be constitutional, though perhaps abrogated or suspended by the S&S Act.

[41]See Konkel v. State, 168 Wis. 335, 170 N.W. 715, 718 (1919).

the military officers of the United States are charged with the enforcement of those parts of the Act with respect to which the States could legislate. In the second place, those officers of the United States who are charged with the enforcement of such parts thereof are the judges, who are well used to examining, with the assistance of counsel, the statute books of the 48 States. In the third place, the convenience to be considered is that of those persons who may have claims against those protected by the Act and of those protected by it who may have claims against others. It is to be noted that in each actual case the procedural protection afforded by the Act will be asserted in the courts of some one State or in federal courts sittting therein.

In *Pierrard v. Hoch* the opinion proceeds from a statement that the Federal Act was passed to protect soldiers and sailors engaged in the prosecution of a war, to quotation of Article VI of the United States Constitution;[42] to a statement that there cannot be two rules covering the same subject matter in a situation where Congress is supreme and a statement that the morale of the troops would be impaired if those from Oregon should be affected by a moratorium law greatly different from that affecting others;[43] to citation and approving discussion of various cases concerning interstate commerce,[44] and distinction of cases in which Congress had not acted[45] and cases in which Congress had specifically negatived an intention to occupy the field to the exclusion of the States.[46]

It is submitted that this argument rests upon an unjustified assumption, namely, that the morale of the troops would be impaired if one State should give greater protection to those soldiers and sailors affected by its laws than was given by Congress to all soldiers and sailors. It is easy to make a resounding statement of that nature, but very difficult to prove its truth or error. It seems clear that no State can be allowed to deny

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[42]"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[43]Pierrard v. Hoch, 97 Ore. 71, 191 Pac. 328, 330 (1920).

[44]For example, New York Central R.R. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. ed. 1045, L. R. A. 1918C 439, Ann. Cas. 1917D 1139 (1917) (Federal Employers' Liability Act abrogates State acts in cases of persons employed in interstate commerce); Charleston Ry. v. Varnville Furniture Co., 237 U. S. 597, 35 Sup. Ct. 715, 59 L. ed. 1137, Ann. Cas. 1916D 333 (1916) (invalidity of South Carolina statute providing a penalty for failure to pay claims for damages to interstate shipments, where Congress had legislated on the subject).

[45]For example, Atlantic C. L. R. Co. v. Georgia, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. ed. 1312 (1914) (Georgia statute prescribing a certain type of headlight valid, where Congress had not legislated on the subject and where the effect on interstate commerce was only incidental).

[46]Carey v. South Dakota, 250 U. S. 118, 39 Sup. Ct. 651, 57 L. ed. 1129, Ann. Cas. 1914C 156 (1914).

in its courts the minimum protection given by Congress, but by no means clear that the giving of a greater protection in the courts of Oregon would have any effect upon soldiers or sailors who would not come in contact with those courts. Furthermore, it is very doubtful that any considerable number of those in military service even know of the existence of the problem of the interruption of statutes of limitation, or of the existence of the Soldiers' and Sailors' Civil Relief Act or of possible State legislation on the subject, and far from clear that the possible dissatisfaction of the few who may be affected by the legislation would have any effect upon the morale of the great body of the troops. Moreover, it is doubtful that this is a field in which Congressional action invalidates State action, even if there is "conflict" between the two statutes. As suggested above, and as said by Owen, J., dissenting in *Konkel v. State*:[47] "Congress simply demanded such immunity as was required by its military exigencies and. . . had no power to demand any more." So long as no State refuses the protection given by the Federal Act, the War, Military and Naval powers of Congress are not impaired; and Congress, in this connection, is limited to those powers. The States have an independent problem, that of re-habilitation of their citizens who return from war to take up again the normal pursuits of peace. This problem will have different aspects in the several States and it seems that each legislature should be as free as possible to attempt to solve its own problems inherent in a transition from a war economy to a peace economy. The right and duty of a State to attempt to solve this problem of re-habilitation was recognized and stated in *Strand v. Larson*:[48] and, while it is true that the majority opinion did not mention the Soldiers' and Sailors' Civil Relief Act of 1918, it seems evident that it cannot have been absent from the minds of the majority: Robinson, J., dissented upon the ground of the existence of the federal statute,[49] and Christianson, C. J., concurred specially, expressing a doubt as to the constitutionality of the State Moratorium Act, but refusing to decide that question on the ground that it had not been raised.[50]

It is submitted, therefore, that a State moratory statute insofar as it provides for less protection than does the Federal Act is superseded by the latter; but that such a statute can have independent validity and effectively give more protection to those protected by the Soldiers' and Sailors' Civil Relief Act of 1940, provided that it does not impair the obligation of

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[47]168 Wis. 335, 170 N.W. 715, 718 (1919). See also the more extended quotation from this opinion in the text at notes 33 and 34 *supra*.
[48]45 N. D. 7, 176 N.W. 736, 737 (1920).
[49]176 N.W. at 738.
[50]*Ibid.*

contract or take property without due process of law, and provided that it is directed to problems of the protection of persons in the military service of the United States as persons requiring a period of re-habilitation in order to get back successfully into civilian life, rather than as members of the military establishment required for the successful prosecution of national defense or of war. This conclusion is based upon the considerations set out above and upon the consideration that the authority derived by analogy from cases concerning the regulation of interstate commerce does not properly affect the problems here discussed. It is clear that plenary power to regulate interstate commerce is given to Congress[51] and that plenary military and war powers are also given.[52] It seems clear, also, that an attempt by a state to regulate commerce necessarily interferes with Congressional regulation in that field. But it is at least doubtful that regulation of the return to civil life interferes with the military powers.

Protection of Persons Secondarily Liable

Persons secondarily liable are given protection under the terms of the Act, for it is provided that:

> "Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended."[53]

Moreover,

> "When a judgment or decree is vacated or set aside in whole or in part. . . the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, endorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered."[54]

General Relief

Article II provides for requiring of affidavits for the entry of default judgments;[55] for punishment for false affidavits;[56] for appointment of attorneys for persons in military service;[57] for re-opening of

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[51]U. S. Const. Art. I, § 8(3).
[52]*Id.* Art. I, 8(11)-(16).
[53]S&S Act § 103(1).
[54]*Id.* § 103(2).
[55]*Id.* § 200(1).
[56]*Id.* § 200(2).
[57]*Id.* § 200(3).

judgments;[58] for stay of proceedings;[59] for relief against fines and penalties;[60] for stay of execution and attachment;[61] for length of stay of proceedings, executions and attachments, and for discretion to vary the period of stay;[62] and for exclusion of the period of military service in computing the running of statutes of limitations.[63]

A. *Affidavits Respecting Military Service*

It is provided that:

> "In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service."[64]

If the plaintiff cannot file such an affidavit he shall file an affidavit setting forth that defendant is in military service, or that he cannot determine whether or not the defendant is in such service.[65] Moreover, it is provided that:

> "If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment."[66]

It is further provided that:

> "Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part."[67]

While the language of this section is in mandatory terms, it seems that compliance therewith is not jurisdictional. If, in fact, the defendant is not in the military service, failure to file an affidavit to that effect is at most an irregularity and a judgment entered on default against such

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[58] *Id.* § 200(4).
[59] *Id.* § 201.
[60] *Id.* § 202.
[61] *Id.* § 203.
[62] *Id.* § 204.
[63] *Id.* § 205.
[64] *Id.* § 200(1).
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*

a defendant is valid.[68] This results follows on several considerations: (1) If failure to file an affidavit constitutes a jurisdictional defect, thousands of cases would require reversal or setting aside even though the defendant is not under the protection of the Act, which is confined to persons in the military service, their sureties, guarantors, *etc.*[69] (2) Relief from judgments improperly entered against persons within the protection of the Act is provided in Section 200(4) thereof.[70] (3) It is also provided in the same section that "vacating, setting aside or reversing, a judgment because of the provisions of the Act shall not prejudice any right or title of bona fide purchaser for value under the judgment."[71] (4) It is not provided in the Act that a judgment shall be ineffective if rendered on default and in the absence of the specified affidavit.[72] It has also been suggested that this section of the Act does not apply to actions *in rem* which may proceed to judgment without personal service on the defendant and without appearance by him.[73] The argument is that the Act is in terms of "in default of appearance" and that personal jurisdiction is immaterial in such actions.[74] It is submitted, however, that this is erroneous: whether or not personal jurisdiction is a necessary foundation for a valid judgment, a judgment entered without appearance by the defendant is "in default of appearance."

In connection with the requirement of the filing of an affidavit, it is to be noted that personal appearance and defense on the merits causes the question of military service to be superseded by and included in the

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[68]Howie Mining Co. v. McGary, 256 Fed. 38 (N. D. W. Va. 1919); Mader v. Christie, 52 Cal. App. 138, 198 Pac. 45 (1921); Harrell v. Shealey, 24 Ga. App. 389, 100 S.E. 800 (1919); Schroeder v. Levy, 222 Ill. App. 252 (1921); Eureka Homestead Soc. v. Clark, 145 La. 917, 83 So. 190 (1919); State v. District Court, 55 Mont. 602, 179 Pac. 831 (1919); Alzugaray v. Onzurez, 25 N. M. 662, 187 Pac. 549 (1920); Wells v. McArthur, 77 Okla. 279, 188 Pac. 322 (1920).

It seems clear that a defendant cannot take advantage of the plaintiff's failure to file an affidavit unless his motion to have the judgment vacated, or perhaps the whole record, shows that he was in military service [Harrell v. Shealey, *supra*] and that this is, *a fortiori*, the rule where, in reply to defendant's motion to set aside the judgment, which motion contained no assertion that defendant was in the military service, plaintiff files an affidavit that defendant was not in such service.

[69]Howie Mining Co. v. McGary, 256 Fed. 38 (N. D. W. Va. 1919); Alzugaray v. Onzurez, 25 N. M. 662, 187 Pac. 549 (1920).

[70]Howie Mining Co. v. McGary, 256 Fed. 38 (N. D. W. Va. 1919); Schroeder v. Levy, 222 Ill. App. 252 (1921); Eureka Homestead Soc. v. Clark, 145 La. 917, 83 So. 190 (1919).

[71]See cases cited note 70 *supra*.

[72]Eureka Homestead Soc. v. Clark, 145 La. 917, 83 So. 190 (1919).

[73]Howie Mining Co. v. McGary, 256 Fed. 38 (N. D. W. Va. 1919); but *cf.* State v. District Court, 55 Mont. 602, 179 Pac. 831 (1919) (suit to remove cloud on title); Alzugaray v. Onzurez, 25 N. M. 662, 187 Pac. 549 (1920) (divorce); Combs v. Combs, 180 N. C. 381, 104 S.E. 656 (1920) (divorce).

[74]Howie Mining Co. v. McGary, 256 Fed. 38, 40 (N. D. W. Va. 1919).

judgment;[75] that an appeal on the ground of lack of affidavit will be dismissed as frivolous where defendant appeared personally, was granted leave to file his answer late, but filed no answer;[76] and that the affidavit is filed in time when it is filed after the entry of default but before entry of the judgment.[77]

B. *Appointment of Attorney for Military Defendant*

If it appears in any action or proceeding that a party is in the military service and does not appear personally or is not represented by an authorized attorney, the court may appoint an attorney to represent him, but no attorney so appointed has the power to waive any right of the party, nor to bind the party by his acts.[78]

Under this section a clear distinction is to be drawn between *authorized* attorneys, who derive their power from their clients, and *appointed* attorneys, whose function is to protect the interests of the defendant in military service, not to bind him. Thus an attorney appointed by the court under this section of the Act cannot bind the defendant by service of notice of appearance, nor by answer.[79]

Only once was the question of the right of attorneys so appointed to receive compensation been brought into question, and, that once, the court refused compensation on the ground that the Act does not provide therefor, and said that every member of the bar should consider it a patriotic duty to devote his best efforts to the protection of the defendant in military service.[80]

It is to be noted that the Act offers no protection to those who are not, themselves, in military service, but whose attorneys are inducted into such service. It appears, however, that in a proper case the fact that a party's attorney is inducted into the service while engaged in representing the party in a particular litigation,[81] or in connection with a particular claim,[82] will be considered sufficient ground for relief under the general powers of the courts to assure fair trials to both parties. It is evident, however, that a defendant must show diligence, and it appears that he does not show proper diligence where the attorney is inducted into the military serv-

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[75]People *ex rel.* Rigoulot v. Byrne, 189 N. Y. Supp. 916 (Sup. Ct. 1921); Woytek v. King, 218 S.W. 1081 (Tex. Civ. App. 1920) *semble.*
[76]Bulgin v. American Law Book Co., 77 Okla. 112, 186 Pac. 941 (1920).
[77]Mader v. Christie, 52 Cal. App. 138, 198 Pac. 45 (1921).
[78]S&S Act § 200(3).
[79]Davison v. Lynch, 103 Misc. 311, 171 N. Y. Supp. 46 (Sup. Ct. 1918).
[80]*Ibid.*
[81]*In re* Weldon, 262 Fed. 828 (N. D. Iowa 1920).
[82]Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S.E. 706 (1919).

ice in August and the default judgment is taken at the October Term in the same year.[83] Nor, it seems, does a bankrupt show unavoidable delay in filing his application for discharge where his original attorney was inducted into the service nine months before the said petition is required by the Bankrupty Act to be filed.[84] It is especially to be noted in cases where the attorney of a defendant is inducted into the military service that the defendant, who seeks to set aside a judgment on that ground, must show a meritorious defense.[85]

The Act also provides that any person who knowingly makes or uses a false affidavit, required under this section,[86] is guilty of a misdemeanor and subject to imprisonment for not more than one year, or a fine of not more than $1000, or both.

C. *Re-opening of Judgments*

Persons in the military service against whom judgments are rendered in any action or proceeding governed by this section, where the judgment is rendered during such service or within thirty days thereafter, may have such judgment re-opened by application by themselves or their legal representatives within ninety days of the termination of service, provided that it is shown that such defendant had a meritorious defense[87] and that defendant was prejudiced in his defense by his military service.[88] It is also provided, however, that vacating, setting aside, or reversing any judgment under the Act "shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."[89]

In the usual case where a defendant is entitled to restitution of anything he may have lost under a judgment which is later reversed, the term *"bona fide* purchaser" is taken to mean "stranger to the action."[90] In a few States, the same interpretation is adopted even in cases of *void*

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[83]*Ibid.*

[84]*Semble*: *In re* Weldon, 262 Fed. 828 (N. D. Iowa 1920).

[85]Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S.E. 706 (1919).

[86]S&S Act § 200(2).

[87]*Id.* § 200(4); Combs v. Combs, 180 N. C. 381, 104 S.E. 656 (1920); Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S.E. 706 (1919).

[88]S&S Act § 200(4). It seems that a defendant is not prejudiced in his defense if his military service is of such nature that he is engaged in a private business and is able to go home every night [Dietz v. Treupel, 184 App. Div. 448, 170 N. Y. Supp. 108 (Sup. Ct. 1918) *semble*]; nor if his duties permit him to spend at home enough time so that he is not hindered from giving to his defense such time as he and his counsel deem necessary [Fennell v. Frisch's Adm'r, 192 Ky. 535, 234 S.W. 198 (1921) *semble*]; nor if leave would have been granted to him by his superior officers if he had requested it [State *ex rel.* Clark v. Klene, 201 Mo. App. 408, 212 S.W. 55 (1921) *semble*].

[89]S&S Act § 200(4).

[90]See Taintor, *Restitution of Property Transferred under Void and Later Reversed Judgments* (1936) 9 Mississippi Law Journal 157, 171-172.

judgments, provided that the judgment is fair on its face.[91] The reason for these rules given in the modern cases is that the contrary rule—that which does not protect strangers—will tend to depreciate prices at execution sale and that both parties may suffer in that event. If the possible buyers at execution sale cannot be sure of getting an indefeasible title, they are unlikely to pay as much as they would if they were absolutely protected. If less than the maximum obtainable price is actually obtained at the sale, the plaintiff may lose some of the debt to which he is entitled and the defendant will not have so large a credit as he might have, in case the judgment is not set aside, vacated, or reversed.[92]

These considerations lead to the hope that the courts, if the question is presented to them, will construe "bona fide purchaser" in the Act to mean "stranger to the action." If judges are conscientious in requiring that there be filed a bond to protect the defendant unless it appears that he is not in the military service, and insist that the specified affidavit with respect to his military service allege facts which show clearly that he is not in such service, and exercise proper discretion in allowing a stay if he is in military service, the defendant will be properly protected if he is in such service. He will receive a large measure of protection against false affidavits that he is not in service through the criminal provisions with respect to making or using affidavits known to be false; and, in the surely rare case of an innocently false affidavit that he is not in service, he will have the advantage that the greatest obtainable price for his property sold on execution will be credited against his debt, should he finally lose his case. He will be unprotected only in the event that he can have the judgment re-opened or vacated, and that on re-trial he prevails and finds the plaintiff financially unable to make the restitution to which the defendant will be entitled.[93] This situation occurs so rarely that the other considerations set forth above outweigh the danger of its occurrence with consequent loss to the defendant in the service and militate strongly in favor of the suggested construction of "bona fide purchasers" in the Act.

D. *Stay of Actions or Proceedings*

It is provided that any court in which an action or proceeding is brought involving as plaintiff or defendant any person protected by the Act, during the military service or within sixty days thereafter, may grant a stay, on application of the military party, some person for him, or on its

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[91]See *id.* at 173.
[92]See *id.* at 169-173.
[93]See *id.* at 178-179, 183-185.

own motion, unless the court is of the opinion that the ability of the party to participate is not materially affected by his service.[94]

This section applies to actions in tort or contract,[95] replevin,[96] ejectment and unlawful detainer,[97] foreclosure of mortgage,[98] and divorce,[99] and may have the effect of extending the jurisdiction of the Federal District Courts sitting in Bankruptcy.[100] Its important effect seems to be that it extends the normal powers of courts to grant stays in the interests of justice. It sets an objective standard for the exercise of discretion in granting stays,[101] imposes a positive duty on courts to grant such stays on

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[94]S&S Act § 201.

[95]Fennell v. Frisch's Adm'r, 192 Ky. 535, 234 S.W. 198 (1921); Elliott v. Lawson, 87 Ore. 450, 170 Pac. 925 (1918); Ilderton v. Charleston Consol. R. & L. Co., 113 S. C. 91, 101 S.E. 282 (1919); Kuehn v. Neugebauer, 216 S.W. 259 (Tex. Civ. App. 1919); Greenwood v. Puget Mill Co., 111 Wash. 464, 191 Pac. 393 (1920).

[96]Vaughn v. Charpiot, 213 S.W. 950 (Tex. Civ. App. 1919).

[97]Riordan v. Zube, 50 Cal. App. 22, 195 Pac. 65 (1921); People *ex rel.* Rigoulot v. Byrne, 189 N. Y. Supp. 916 (Sup. Ct. 1921); Giluly v. Hawkins, 108 Wash. 79, 182 Pac. 958 (1919).

[98]Dietz v. Treupel, 184 App. Div. 448, 170 N. Y. Supp. 108 (Sup. Ct. 1918).

[99]State *ex rel.* Clark v. Klene, 201 Mo. App. 408, 212 S.W. 55 (1919).

[100]*In re* Weldon, 262 Fed. 828 (N. D. Iowa 1920) (On the theory that Section 14a of the Bankruptcy Act confined the jurisdiction of the court to eighteen months after adjudication on a motion to allow late filing of an application for discharge, the court was of the opinion that the S&S Act might give it jurisdiction to stay the adjudication if the bankrupt were in the military service).

[101]The trial court does not abuse its discretion when it refuses a stay to a defendant in the military service where it does not appear that the prosecution of the war would be impeded, nor he prevented from giving his energy to the needs of the nation or from attending to his military duties, had he given to his defense the attention deemed necessary by himself and his counsel. Fennell v. Frisch's Adm'r, 192 Ky. 535, 234 S.W. 198 (1921); *accord:* Dietz v. Treupel, 184 App. Div. 448, 170 N. Y. Supp. 108 (Sup. Ct. 1918); Greenwood v. Puget Mill. Co., 111 Wash. 464, 191 Pac. 393 (1920) *semble* (military party-plaintiff). Nor is it abuse of discretion to refuse a stay where the decision in a case depends upon the construction of a contract which has already been construed in another action between the same parties. Davies & Davies v. Patterson, 137 Ark. 134, 208 S.W. 592 (1919).

The trial court does, however, abuse its discretion when it refuses a continuance in a case where a soldier, not a party, may be legally affected by a judgment against the actual defendant, and bases its refusal on absence of effect upon the soldier. Ilderton v. Charleston Consol. R. & L. Co., 113 S. C. 91, 101 S.E. 282 (1919). See discussion of this case in note 15 *supra*. *Cf.* Dietz v. Treupel, 184 App. Div. 448, 170 N. Y. Supp. 108 (Sup. Ct. 1918) in which one Shaw had signed the bond accompanying the mortgage. The suit was to foreclose the mortgage. It was said: "We do not think that the court had any power to stay the prosecution of the foreclosure suit. The appellant [Shaw] is not the owner of property. His liability, if any, is contingent, depending on a possible deficiency on the sale of the premises." 170 N. Y. Supp. at 109.

Under the 1940 S&S Act, Hooley, J., speaking for the Supreme Court of New York at Special Term, Queens County, was of the opinion that Dietz v. Treupel, *supra*, was not authority in a case in which the non-military party was the wife of the military party and where the wife was on the bond as well as the military defendant. Jamaica Sav. Bk. v. Bryan, 25 N. Y. Supp(2d) 17 (Sup. Ct. 1941). In this case the property belonged to the wife and the husband and wife were both liable on the bond.

their own motion, and acts as a strong influence on courts to exercise discretion in favor of parties who might ordinarily be denied stays.[102] It appears, however, that a court properly exercises its discretion when it refuses a stay when the party is very little hindered in his participation by his military service,[103] or fails to show good faith in attempting to get leave in order to participate in the proceeding,[104] or, possibly, where the hardship on the other party greatly outweighs the hardship on the military party.[105]

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[102]See Ilderton v. Charleston Consol. R. & L. Co., 113 S. C. 91, 101 S.E. 282 (1919), discussed in note 15 *supra*. It appears that, even in the absence of statutory requirements or authority, the court has inherent power to grant stays to persons in the military service who are prevented by such service from giving important testimony in their own cases, and that a trial court which refuses to grant a stay under such circumstances abuses its discretion. Elliott v. Lawson, 87 Ore. 450, 170 Pac. 925 (1918); Vaughn v. Charpiot, 213 S.W. 950 (Tex. Civ. App. 1919). In Elliott v. Lawson, *supra*, it was said in an opinion reversing the trial court: "Such judicial discretion should be exercised according to fixed legal principles in order to promote substantial justice." 170 Pac. at 926.

[103]Fennell v. Frisch's Adm'r, 192 Ky. 535, 234 S.W. 198 (1921); Dietz v. Treupel, 184 App. Div. 448, 170 N. Y. Supp. (Sup. Ct. 1918).

Under the 1940 S&S Act it was held that an affidavit containing only allegation of the bare fact of service was not sufficient. The court, however, made an order for the taking of proof on the defendant's ability to conduct his defense and permitted that proof to be in the form of affidavits or testimony, as the parties might agree. Jamacia Sav. Bk. v. Bryan, 25 N. Y. Supp.(2d) 17 (Sup. Ct. 1941).

[104]State *ex rel.* Clark v. Klene, 201 Mo. App. 408, 212 S.W. 55 (1919). In this case, plaintiff, an officer in the United States Army, petitioned for divorce against his wife alleging non-residence of the wife and ignorance of her whereabouts. Thus he obtained an order for service by publication, and a decree of divorce on *ex parte* hearing. When the wife learned of the divorce, she petitioned to have the decree set aside and for leave to file an answer, alleging that her husband, the plaintiff, had at all times known where she was and had, therefore, committed a fraud on the court. The husband filed a written motion for stay, alleging his service in the Army and application for leave of absence "to be present at a divorce proceeding to which he was a party." This was denied.

The husband then petitioned for prohibition alleging the above stated facts, denying the fraud, and expressing a desire to be present to refute the wife's charges. Prohibition was denied.

The court appeared to adopt the husband's theory that the wife's charges of fraud reflected upon his honor as a citizen and an officer in the Army, and to turn his theory against him by intimating that his superior officers would probably have granted him leave to defend himself against such charges, though they refused his application for leave "to be present at a divorce proceeding to which he was a party." The court was of the opinion that the application for leave, if it had frankly set out the nature of the proceeding, would have been "quite a different matter, in our judgment, particularly when the granting or denying of the leave of absence is to be passed upon by officers of the United States Army."

[105]State *ex rel.* Clark v. Klene, 201 Mo. App. 408, 212 S.W. 55 (1919) (See facts in note 104 *supra*. The court apparently felt very strongly the persuasive nature of the fact that, if the stay were granted to the husband, the wife would have no standing to demand support from the husband under Art. 95 of the Articles of War governing Courts Martial for the duration of the war and six months thereafter, or for three months after the end of her husband's service.); Dietz v. Treupel, 184 App. Div. 448, 170 N. Y. Supp. 108 (Sup. Ct. 1918) (See facts in note 101 *supra*).

E. *Relief from Fines and Penalties for Breach of Contract*

Relief against the enforcement of fines or penalties accruing by reason of failure to comply with the terms of any contract is provided when an action for compliance with the contract is stayed under the terms of the Act. It must be shown that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that, by reason of such service, the ability of such person to perform or pay was materially impaired.[106]

It is to be noted that neither this section, nor any other section of the Act, protects persons in the military service from forfeiture of an interest in land by way of condition subsequent.[107] Nor does this, or any section, exonerate bail if accused cannot be surrendered or caused to appear, because of his military service.[108]

F. *Stay of Execution*

Courts may stay the execution of any judgment or order entered against a person in the military service, during the period of service or within sixty days thereafter,[109] and may vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment as provided in the Act, unless in the opinion of the court the ability of the defendant to comply with the judgment or order is not materially affected.[110]

In *Studt v. Trueblood*[111] the court refused to stay an order for sale on attachment under a State statute exempting persons in the military service from "any writ of attachment or execution." The reason given by

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[106]S&S Act § 202.

[107]Lima Oil & Gas Co. v. Pritchard, 92 Okla. 113, 218 Pac. 863 (1923); Hickernell v. Gregory, 224 S.W. 691 (Tex. Civ. App. 1920).

[108]Briggs v. Commonwealth, 185 Ky. 340, 214 S.W. 975, 8 A.L.R. 363 (1919). It is often said that voluntary enlistment of the accused does not exonerate his bail, [State v. Reaney, 13 Md. 230 (1858); Sayward v. Conant, 11 Mass. 146 (1814); Lamphire v. State, 73 N. H. 463, 62 Atl. 786, 6 Ann. Cas. 615 (1906)], and that involuntary induction into service does exonerate bail [Robertson v. Patterson, 7 East 405, 103 Eng. Repr. 157 (1806)]. It seems, however, that bail is exonerated if it appears that the accused enlisted without the knowledge or consent of the bail [Gingrich v. People, 34 Ill. 448 (1864); Winninger v. State, 23 Ind. 228 (1864)] and that the authorities would not surrender accused to the bail on the latter's application [Winninger v. State, *supra*], or that the accused made a *bona fide* attempt to get a furlough for the purpose of attending the trial [Briggs v. Commonwealth, *supra;* Commonwealth v. Terry, 2 Duv. 383 (Ky. 1866); People v. Cushney, 44 Barb. 118 (N. Y. 1865); McFarland v. Wilbur, 35 Vt. 342 (1862)] or that the accused is stationed so far from the place of trial that he cannot be returned [Briggs v. Commonwealth, *supra*].

[109]S&S Act § 203(a).

[110]*Id.* § 203(b).

[111]190 Iowa 1225, 181 N.W. 445 (1921).

the court was that the proceeding for sale was merely to make the attachment more effective and to preserve the property from waste, and that it was as much for the benefit of the defendant as of the plaintiff. It was said that the order for sale was merely collateral to the attachment, which had been made before the defendant entered the military service, and came within the court's ancillary power to conserve the property.

Any stay of any action, proceeding, attachment or execution under the Act may be ordered for the period of military service and three months thereafter, or for any part of such period, "and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise."[112] It is further provided that the plaintiff may by leave of court proceed against non-military co-defendants, though a military defendant is entitled to a stay.[113]

Under the 1940 Act it has been held that the military defendant is not entitled to modification of an order for alimony nor to stay of enforcement thereof merely upon the ground of military service. The court took note of the fact that his pay of $84 per month is almost net to him; that the wife would have to feed, clothe and shelter herself and their children; and there was some question whether or not the defendant's employer was making up the difference between his military and civilian pay. On the wife's motion to punish the husband for contempt and for other relief and defendant's petition for modification of the alimony order, the court ordered the taking of proof by affidavits or testimony as to the financial situation of the parties, and gave leave to have the defendant's testimony taken by deposition if he was away at camp.[113a]

G. *Statutes of Limitations Interrupted*

Provision is made for the exclusion of the period of military service from the computation of any period for the bringing of any action by or against any person in the military service, or by or against his heirs, executors, administrators or assigns, whether the action accrued before or during the military service.[114]

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[112]S&S Act § 204.

[113]*Ibid.* Under the 1940 S&S Act the Supreme Court of New York at Special Term ordered the taking of proof as to the financial resources of a wife who was liable on a mortgage bond with her husband, the military defendant, in an action to foreclose the mortgage. As indicated in note 101, *supra,* it was said that Dietz v. Treupel, 184 App. Div. 448, 170 N. Y. Supp. 108 (Sup. Ct. 1918), there discussed, was not authority in the instant case. Jamaica Sav. Bk. v. Bryan, 25 N. Y. Supp.(2d) 17 (1941).

[113a]Clarke v. Clarke, 25 N. Y. Supp.(2d) 64 (Sup. Ct. 1941).

[114]S&S Act § 205.

This section, of course, protects parties who are in the military service with respect to all personal actions,[115] and it will undoubtedly be applied to actions *in rem,* as it covers in terms all "actions."[116] It applies also to interrupt the period of statues of non-claim,[117] and may extend the period in which a bankrupt must apply for discharge after adjudication.[118] It applies whether time limited for the beginning of an action is prescribed by a statute of limitations or by a term of the contract.[119]

In the case last cited the defendant argued that the period was not limited by law, but by contract. The court rejected this argument on the ground that a contractual limitation is ineffective without the sanction of law, and that there was, thus, a period limited by law. The court said:

> "It is manifest that the present case is within the spirit and intent of the act. The purpose was to extend the time for bringing actions generally. It was not the legislative intent that the remedial purpose of the act should be defeated by a narrow or technical construction."[120]

This approach was carried even further in *Clark v. Mechanics' American National Bank*[121] where plaintiff was given a mechanic's lien by statute,[122] which lien was made ineffective unless suit was brought on the claim, or the claim filed, within one year from the time when it accrued.[123] Plaintiff sued on the claim nearly two years after it accrued, but within one year if the period of his military service was excluded from the computation of time. Reversing the trial court, the appellate court held that plaintiff was entitled to his lien. The court pointed out that the Soldiers' and Sailors' Civil Relief Act of 1918 did not mention statutes of limitation, but that it was in terms of "any period now or hereafter to be limited for the bringing of any action," and was of the opinion that it applied

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[115]Lewis v. Anthony Pub. Co., 111 Kans. 653, 208 Pac. 254 (1922); Green v. Bankers' Life Ins. Co., 112 Kans. 50, 209 Pac. 670 (1922); Steinfeld v. Mass. Bonding & Ins. Co., 80 N. H. 39, 112 Atl. 800 (1921); Erickson v. Macy, 231 N. Y. 86, 131 N.E. 744, 16 A.L.R. 1322 (1921); Easterling v. Murphy, 11 S.W.(2d) 329 (Tex. Civ. App. 1928, writ of error refused) (suit by heirs of sailor); Bell v. Baker, 260 S.W. 158 (Tex. Comm. App. 1924).

[116]Ebert v. Poston, 266 U. S. 548, 45 Sup. Ct. 188, 69 L. ed. 435 (1925) *semble;* same, 221 Mich. 361, 191 N.W. 202 (1922); Clark v. Mechanics' Am. Nat. Bk., 282 Fed. 589 (C.C.A. 8th, 1922); Bell v. Buffington, 244 Mass. 294, 137 N.E. 287 (1923).

[117]Bolz Cooperage Co. v. Beardslee, 211 Mo. App. 109, 245 S.W. 611 (1922) *semble.*

[118]*In re* Weldon, 262 Fed. 828 (N. D. Iowa 1920) *semble.*

[119]Steinfeld v. Mass. Bonding & Ins. Co., 80 N. H. 39, 112 Atl. 800 (1921).

[120]*Ibid.*

[121]282 Fed. 589 (C.C.A. 8th, 1922).

[122]Ark. Dig. Stat. (Crawford & Moses, 1921) § 8555.

[123]*Id.* § 8556.

as well to statutes creating causes of action and limiting them as to statutes barring actions.[124]

In *Ebert v. Poston*[125] the Michigan Supreme Court went still further in a decision that Section 205 of the 1918 Act applied to redemption of property under a mortgage foreclosed by advertisement and sale. The court was of the opinion that the Act should be liberally construed and that "no reason appears why the act should be applied to a chancery foreclosure and not to a foreclosure by advertisement. . . . The protection of those in the service by suspension of legal proceedings and transactions which prejudice their civil rights was the prime purpose of the act." The Supreme Court of the United States, however, reversed on the ground that Section 205 of the Act did not apply to transactions effected without judicial action, that the right to redeem from such a sale is a primary right as distinguished from a remedy, and that the bill in equity is merely the remedy by which the right may be enforced.[126] The Supreme Judicial Court of Massachusetts reached the same conclusion with respect to the extension of time of redemption under a statute providing for foreclosure of mortgage by entry and possession.[127]

The course of decision in New York was opposite. In that State the Code of Civil Procedure provides that a plaintiff who has attempted and failed to make personal service of process on the defendant may obtain an order for service by publication and by making such service stop the running of the statute of limitations. In 1920 the Appellate Division of the Supreme Court decided that the Soldiers' and Sailors' Civil Relief Act of 1918 had no application to this requirement.[128] The theory was that for this purpose the limitational period was a jurisdictional period. In 1921 the Court of Appeals, in another case between the same parties, reached

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[124]The extension of the S&S Act of 1918 was more apparent than real. Though the court spoke of "liberal construction" of the Act, it seems that the application was within the letter thereof as well as within the spirit. It is true that a statute which limits a right of action which it creates is commonly said to embody a *substantive* rather than a *procedural* limitation, but it is to be noted that one of the limitations upon the right was the bringing of an action within one year. This seems clearly a "period . . . limited by . . . law for the bringing of [an] action."

[125]221 Mich. 361, 191 N.W. 202 (1922).

[126]Ebert v. Poston, 266 U. S. 548, 45 Sup. Ct. 188, 69 L. ed. 435 (1925). *Accord:* Wood v. Vogel, 204 Ala. 692, 87 So. 174 (1920); Taylor v. McGregor St. Bk., 144 Minn. 249, 174 N.W. 893 (1919).

[127]Bell v. Buffington, 244 Mass. 294, 137 N.E. 287 (1923). It was said that Section 205 of the Act provided merely for exclusion of the term of military service from periods of limitations and that Mass. R. L. (1902) c. 187 was not a statute of limitation.

[128]Erickson v. Macy, 183 N. Y. Supp. 689, 112 Misc. 660 (Sup. Ct. 1920), *aff'd in memo. opinion,* 197 N. Y. Supp. 911 (4th Dep't 1922), *rev'd on other grounds,* 236 N. Y. 412, 140 N.E. 938 (1923) (construing N. Y. Code Civ. Proc. §§ 382, 399, 414, 438, 439).

the contrary conclusion on the ground that the Act of 1918 extended the period in which personal service could be made and reversed the Appellate Division which had given an order for publication.[129] In Texas it was decided that the Act of 1918 applied to extend the period in which an appellee could pay the costs of appeal and demand issuance of the mandate of remand.[130]

The language of this section of the Act, together with numerous *dicta,* may cause confusion with respect to the length of the extension of time given by the Act. The terms are: "The period of military service shall not be included." In several cases the court says that the entire period of military service is to be deducted from the actual time elapsed in order to determine whether the statute of limitations has barred the action.[131] Examination of the cases, however, shows that in no case was it necessary to deduct more than that portion of military service which elapsed after the cause of action accrued.[132]

It seems improbable that the wording of the Act was intended to be taken in its literal significance, and it is submitted that the period to be excluded from the computation of time is only that part of the service which elapses after the right accrues.

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[129]Erickson v. Macy, 231 N. Y. 86, 131 N.E. 744, 16 A.R.L. 1322 (1921), (*reversing,* 185 N. Y. Supp. 926 (3rd Dep't 1920).

[130]Kuehn v. Neugebauer, 216 S.W. 259 (Tex. Civ. App. 1919). In this case the Clerk of the Court had refused to issue the mandate of remand on the ground that the statutory provision for the payment of costs on appeal created a mandatory condition precedent to the issuance of the mandate. The court said, however, that, although this matter "probably does not fall within the strict letter of the last-named section [§ 205], and that it would be giving it a very liberal construction to hold it applicable here. However, in view of the broad purposes of the act expressed in the first section and the remedial nature of every provision in it, it is believed by the writer that the subject matter of this motion falls within the spirit of the article [Art. II] without further elaborating the question."

[131]"It is clear therefore that under the provisions of this act the 20 months in which [plaintiff] was in the military service is not to be computed in determining whether the statute of limitations bars him." Kosel v. First Nat. Bk., 55 N. D. 445, 214 N.W. 249 (1927). "The time the plaintiff was absent from home as a soldier in the service of his country cannot be—'included in computing any period . . . ' So runs the supreme law of the land." Lewis v. Anthony Pub. Co., 111 Kans. 653, 208 Pac. 254 (1922). "The limitation would not include the time young Green was a soldier, nor the time thereafter when the plaintiff did not know whether her son was alive or dead." Green v. Bankers' Life Ins. Co., 112 Kans. 50, 209 Pac. 670 (1922).

[132]Cases cited note 131 *supra,* and Easterling v. Murphy, 11 S.W.(2d) 329 (Tex. Civ. App. 1928) (At the time when the cause of action accrued the person whose right was asserted by his heirs was a sailor and a minor. Limitation did not run against him until his majority which he reached in 1918. In the meantime the S&S Act of 1918 had been enacted, and he was discharged on Jan. 18, 1921. The period of limitation, then, began running on the date of discharge).

Rent, Installment Contracts, Mortgages

Article III deals with questions pertaining to eviction of dependents,[133] punishment for unlawful evictions,[134] allotments from military pay for rent,[135] installment agreements,[136] punishment for unlawful repossessions,[137] proceedings on installment agreements,[138] mortgage obligations,[139] stay of proceedings,[140] procedure for court order for sales under power of sale,[141] and re-possession of motor vehicles.[142]

A. *Eviction of Dependents*

It is provided that:

> "No eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed $80 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession."[143]

Unless, in the opinion of the court, the ability of the tenant to pay the agreed rent is not materially affected by reason of military service, the court may of its own discretion on its own motion, and shall, on application, stay the proceedings for not longer than three months, or the court may make such order as may be just.[144] It is further provided that any person who knowingly takes part in any eviction or distress otherwise than as provided in the Act[145] shall be guilty of a misdemeanor punishable by imprisonment not to exceed one year, or by fine of not more than $1000, or both.[146] An allotment from the pay of a person in military service may be made in reasonable proportion to discharge the rent of premises affected by this section.[147]

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[133] S&S Act § 300(1).
[134] *Id.* § 300(3).
[135] *Id.* § 300(4).
[136] *Id.* § 301(1).
[137] *Id.* § 301(2).
[138] *Id.* § 301(3).
[139] *Id.* § 302(1).
[140] *Id.* § 302(2).
[141] *Id.* § 303(3).
[142] *Id.* § 303. Note: This section is new; nothing like it was in the 1918 Act.
[143] *Id.* § 300(1).
[144] *Id.* § 300(2).
[145] *Id.* § 300(1).
[146] *Id.* § 300(3).
[147] *Id.* § 300(4). Allotments may be made by the Secretary of War, the Secretary of the Navy, or the Secretary of the Treasury (with respect to the Coast Guard). Note: The clause empowering the Secretary of the Treasury was not in the 1918 Act, but is new.

In the two cases in which this section of the 1918 Act was applied it appears that this section is not jurisdictional and that defendant's affidavit of dependency and of military service may be filed before or after the rendition of judgment.[148] In California the court was of the opinion that three months is the maximum period authorized by the Act,[149] while in Washington the court seems to have been of the opinion that in a proper case an order of suspension of execution for a longer period may be "such order as may be just."[150]

It is to be noted that there are no exceptions in terms embodied in the Act and, considering the fact that the enactment was to protect persons in military service and their dependents, it seems possible, though improbable, that no exceptions will be engrafted on the Act. In the wartime housing act affecting the District of Columbia[151] there were four express exceptions, relevant to cases which may arise under the Soldiers' and Sailors' Civil Relief Act. This act applied to all leases of one month or more and allowed the tenant to remain in possession as long as he continued to pay the agreed rent, except that tenants could be evicted at the end of a lease under the following conditions:

(1) Where the tenant committed waste.

(2) Where the tenant had been guilty on the premists of conduct constituting nuisance, misdemeanor or crime.

(3) Where the landlord or a *bona fide* purchaser from him necessarily required the premises for occupation by himself, his wife, children or dependents while he was officially connected with or in the employ of any branch of the government.

(4) Where the property was sold to a *bona fide*[152] purchaser for his own occupancy.

It seems improbable that the section of the 1940 Act under discussion will be held to operate as a shield for the commission of waste, nuisance or crime on the premises and it is, therefore, believed that in such a case the courts will without hesitancy grant an order for eviction. On the other hand, inasmuch as the three-month period specified in the statute is a protection to dependents of service men, in that it gives them time to look for other quarters, it is believed that courts will refuse such

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[148]Riordan v. Zube, 50 Cal. App. 22, 195 Pac. 65 (1921); Giluly v. Hawkins, 108 Wash. 79, 182 Pac. 958 (1919).

[149]Riordan v. Zube, 50 Cal. App. 22, 195 Pac. 65 (1921).

[150]Giluly v. Hawkins, 107 Wash. 79, 182 Pac. 958 (1919).

[151]Joint Resolution of May 31, 1918; 40 STAT. 593 (1918).

[152]*Bona fides*, in this situation, consists in lack of purpose of evading the act. Maxwell v. Brayshaw, 258 Fed. 957 (App. D. C. 1919).

orders except on condition of an interim period allowing such finding of other quarters.

It may be that paragraphs (1) and (2) of the section will be read together and that the courts will hold that their discretion to stay eviction exists only in cases in which the eviction is for non-payment of rent. This possibility is strengthened by the fact that paragraph (1) forbids eviction or distress, which latter can apply only to failure to pay rent.

B. *Installment Contracts*

The Act covers in one section installment contracts for the purchase of real or personal property, and contains other provisions, which will be discussed later, with respect to obligations secured by mortgage and to re-possession of motor vehicles. It is provided that:

> "No person who prior to the date of approval[153] of this Act has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for non-payment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction."[154]

Such contracts may be modified, terminated, or cancelled, or there may be re-possession or retention of the property purchased or received under installment contracts, provided that there is mutual agreement of the parties, or of their assigns and provided that such agreement is in writing and is executed after the making of the contract and during or after the period of service.[155]

Any person who knowingly resumes possession of property in violation of this section may be punished by imprisonment for not more than one year, or by fine of not more than $1000, or both.[156]

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[153] October 17, 1940.
[154] S&S Act § 301(1).
[155] *Ibid.*
[156] *Id.* § 301(2). An Associated Press dispatch under a San Francisco date line in the Memphis Commercial Appeal of March 26, 1941, indicates that the teeth in this section will be exercised. Although the defendant had repaid all costs to the service man whose car had been repossessed, it pleaded guilty. Louderback, J., imposed a nominal fine of $50 and said that "if this sort of thing occurs again we will not be giving out nominal fines." Ass't U. S. Atty. Karesh is reported to have said that the case had been called to his attention by the Army, and that he had pressed the case in order to call attention to the law.

The courts are given broad powers as to installment agreements. Except in certain cases with respect to re-possession of motor vehicles,[157] on the hearing of an action the court may order the repayment of prior installments or deposits, or any part thereof, as a condition of terminating the contract and resuming possession of the property, or it may, in its discretion, on its own motion, and shall on application to it by a person in military service or some person in his behalf, order a stay of proceedings, unless in its opinion the ability of the defendant to perform the contract is not materially affected by reason of his military service, or the court may otherwise dispose of the case as may be equitable to preserve the interests of all parties.[158]

C. Mortgages

It is provided that Section 302

> ". . . shall apply only to obligations originating prior to the date of approval of this Act[159] and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him."[160]

The court may stay any proceedings commenced during the period of service to enforce such obligations in its discretion on its own motion and shall, except as provided in Section 303 of the Act, so stay proceedings on application by the person in service or by some other in his behalf or make such other disposition of the case as may be equitable to preserve the interests of all parties.[161] Moreover,

> "No sale under a power of sale or under a judgment entered upon a warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court."[162]

It has been held that this section applies to *obligations* originating prior to the period of military service, not to mortgages then made. In

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[157]See S&S Act § 303, quoted page 494 *infra*.

[158]*Id.* § 301(3). The S&S Act was enacted to protect soldiers and sailors during their terms of service and, where the vendor sues the administrator of such a person, who died in the service, for cancellation or specific performance of a contract to buy land the trial court is without power to impose a condition of repayment of a down payment upon a decree for cancellation. Nelson's Real Estate Agency v. Seeman, 157 Minn. 354, 180 N.W. 227 (1920).

[159]October 17, 1940.

[160]S&S Act § 302(1).

[161]*Id.* § 302(2).

[162]*Id.* § 302(3).

Kendall v. Bolster[163] the mortgagor made a mortgage in 1917, prior to his entry into the service. After his induction into the service he made another mortgage on the same property and the mortgagee under the earlier mortgage assigned it to the mortgagee under the later mortgage as additional security. Default was made in the payments due on the later mortgage and the mortgagee foreclosed the earlier mortgage. It was held that the foreclosure sale was entirely valid, as the obligation which was enforced originated after the commencement of the period of military service.

Although the Act of 1918 contained no provision validating foreclosure sales if assented to by the mortgagor during his military service, it was held that the Act does not protect a mortgagor who so assents.[164] The 1940 Act likewise contains no provision with respect to assent by the mortgagor and it might be concluded that the result will be the same. However, the fact that there has been inserted in Section 301(1)[165] of the 1940 Act a provision for written agreement to the rescission or termination of installment contracts may make the silence of Congress significant with respect to such assent in cases of mortgage sales.

It is the established rule in Massachusetts that persons who hold the equitable title to land are owners thereof under this section,[166] even though the equity is secret and created by oral agreement.[167] This result is justified by construction of the Act, which is not confined to legal titles or known equities. This rule is not so drastic as it appears for, while it is true that a mortgagee who sells the property under a contractual power of sale does so at his own risk, the existence of the Soldiers' and Sailors' Civil Relief Act gives to equity courts the power to grant judicial foreclosure of power-of-sale mortgages, though in the absence thereof no such power exists: this is a special circumstance which extends the power of equity courts.[168]

The mortgagee, then, is safe only if he obtains an order for sale from the equity court, or forecloses by entry and possession if permitted under

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[163]239 Mass. 152, 131 N.E. 319 (1921).
[164]Church v. Brown, 247 Mass. 282, 142 N.E. 91 (1924).
[165]See text at note 155 *supra*.
[166]Kendall v. Bolster, 239 Mass. 152, 131 N.E. 319 (1921); John Hancock Mut. Life Ins. Co. v. Lester, 234 Mass. 559, 125 N.E. 594 (1920); Morse v. Stober, 233 Mass. 223, 123 N.E. 780, 9 A.L.R. 78 (1919); Hoffman v. Charlestown Five Cents Sav. Bk., 231 Mass. 324, 121 N.E. 15 (1918).
[167]Hoffman v. Charlestown Five Cents Sav. Bk., 231 Mass. 324, 121 N.E. 15 (1918). This decision was supported by statement of the rule that the statute of frauds is not available to third persons.
[168]*Ibid.*

State laws.[169] Moreover the court will frame the order for sale as nearly as possible in terms of the power of sale in the mortgage,[170] and in a case in which the equitable owners will be properly represented by trustees who have no adverse interest the court will grant an order for sale.[171]

Of course, mortgagees can proceed to sell the property under the power of sale and, after buying at such sale, will have a title which will support a decree for specific performance of a contract to buy the land "free from all incumbrances" if they can maintain their burden of proof and "demonstrate to the satisfaction of the court that no person in the military service had any interest in the property."[172]

D. *Re-possession of Motor Vehicles*

Obligations growing out of the sales and purchase of motor vehicles are covered under specific terms of the Act. Only under specified conditions may motor vehicles be re-possessed by the seller. Section 303 of the Act provides:

> "No court shall stay a proceeding to resume possession of a motor vehicle, tractor, or the accessories of either, or for an order of sale thereof, where said motor vehicle, tractor, or accessories are encumbered by a purchase money mortgage, conditional sales contract, or a lease or bailment with a view to purchase, unless the court shall find that 50 per centum or more of the purchase price of said property has been paid, but in any such proceeding the court may, before entering an order or judgment, require the plaintiff to file a bond, approved by the court, con-

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[169]John Hancock Mut. Life Ins. Co. v. Lester, 234 Mass. 559, 125 N.E. 594 (1920) (judicial order for sale); Bell v. Buffington, 244 Mass. 294, 137 N.E. 287 (1923) (re-entry and three years possession); Lima Oil & Gas Co. v. Pritchard, 92 Okla. 113, 218 Pac. 863 (1923) *semble;* Granger v. Luther, 42 S. D. 636, 176 N.W. 1019 (1920). It was said in Bell v. Buffington, *supra:* "Presumably Congress did not deem such extraordinary relief measures necessary where the title of the mortgagor would not be foreclosed until the possession by the mortgagee had continued for three years." See also the remarks of Mr. Justice Brandeis in Ebert v. Poston, 266 U. S. 548, 554, 45 Sup. Ct. 188, 69 L. ed. 435 (1925): "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation. This act is so carefully drawn as to leave little room for conjecture. It deals with a single subject and does so comprehensively and in detail. . . . Such care and particularity in treatment preclude expansion of the act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions." This language, which was said of the 1918 Act, plus the change in the preamble of the 1940 Act (see note 2 *supra* and accompanying text for differences in the preambles of the 1918 and 1940 Acts) seems to answer the possible query as to whether Congress could have intended to confine the Act to judicial foreclosures, leaving local peculiarities of methods of foreclosure untouched.

[170]John Hancock Mut. Life Ins. Co. v. Lester, 234 Mass. 559, 125 N.E. 594 (1920).

[171]*Ibid.*

[172]Morse v. Stober, 233 Mass. 223, 123 N.E. 780, 9 A.L.R. 78 (1919).

ditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any such judgment or order should the judgment or order be set aside in whole or in part."

Insurance

Article IV deals with rights under life insurance policies. Subjects dealt with include procedure in making application for benefits by persons in military service,[173] maximum amount of policies on which benefits are allowed,[174] policies in default,[175] duties of Veterans' Administration in administering the terms of the Act,[176] reduction of benefits on policies aggregating over $5000,[177] non-lapse of policies,[178] monthly reports by insurance companies,[179] certificates issued by the Administrator of Veterans' Affairs in the name of the United States to insurance companies,[180] effect of certificates,[181] effect of death of policy holder,[182] lapsing of policies for non-payment of premiums,[183] accounting between United States and insurance companies,[184] payment of insurers,[185] policies not covered under the Act,[186] and insurance companies to which the Act is not applicable.[187]

A. *Persons Benefited*

The benefits of the Act apply to any person in military service who is the holder of a policy of life insurance, "when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Administrator of Veterans' Affairs."[188] Any person in military service may have the benefit of the insurance provisions of the Act:

> ". . . in respect of contracts of insurance in force under their terms up to but not exceeding a face value of $5,000 irrespective of the number of policies held by such person whether in one or more companies, when such contracts were made and a premium was paid thereon before the date of approval of this Act[189]

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[173] S&S Act § 401.
[174] *Id.* § 402.
[175] *Ibid.*
[176] *Id.* § 403.
[177] *Id.* § 404.
[178] *Id.* § 405.
[179] *Id.* § 406.
[180] *Id.* § 407.
[181] *Id.* § 408.
[182] *Id.* § 409.
[183] *Id.* § 410.
[184] *Id.* § 411.
[185] *Id.* § 412.
[186] *Id.* § 413.
[187] *Id.* § 415.
[188] *Id.* § 401(1).
[189] October 17, 1940

> or not less than thirty days before entry into the military service; but in no event shall the provisions of this article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than 50 per centum of the cash surrender value of the policy."[190]

The general administration of the insurance provisions of the Act are placed in the hands of the Veterans' Administration.[191]

B. *Extent of Benefits*

Within the maximum $5,000, persons in military service are protected against the lapsing of policies as a result of non-payment of premium, for it is provided that:[192]

> "No policy which has not lapsed for the non-payment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this article, shall lapse or be forfeited for the non-payment of premium during the period of such service or during one year after the expiration of such period: *Provided,* That in no case shall this prohibition extend for more than one year after the date when this Act ceases to be in force."

Certificates are issued by the United States to insurance companies for the amounts due on defaulted premiums with interest. Sections 406 and 407 of the Act provide for the details which shall be carried out by the Veterans' Administration in issuing the certificates. The United States is given protection under the terms of the Act which provide:[193]

> "The certificate so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Veterans' Administration must be obtained."

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[190] S&S Act § 402.

[191] *Id.* § 403. It may be noted that the duties imposed upon the Veterans' Administration and the Administrator of Veterans' Affairs by the 1940 Act were imposed upon the Bureau of War Risk Insurance and the Secretary of the Treasury, under the 1918 Act, § 403.

[192] S&S Act § 405.

[193] *Id.* § 408.

Persons in the military service are given protection on their insurance policies, within the $5,000 maximum, for a maximum of one year after termination of military service. If the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy "shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof."[194] Moreover, if the insured is in the military service on the date when the Act ceases to be in force, such lapse shall occur and surrender value be payable at the expiration of one year after such date.[195]

There shall be full and final accounting and settlement between the United States and insurance companies at the expiration of one year after the date when the Act ceases to be in force,[196] but in the meantime payments on account stated shall be made by the Secretary of the Treasury, as certified by the Administrator of Veterans' Affairs, from time to time.[197]

The terms of the Act do not apply:

> ". . . to any policy which is void or which may at the option of the insured be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount of premium."[198]

Not all insurance companies are covered under the terms of the Act, for it is provided that:[199]

> "This article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service."

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[194] *Id.* § 410.
[195] *Ibid.*
[196] *Id.* § 411.
[197] *Id.* § 412.
[198] *Id.* § 413.
[199] *Id.* § 414.

Taxes and Public Lands

A. *Taxes on Land*

Article V deals with certain types of protection given persons in military service in regard to taxes and public lands. Protection is given on no taxes except on real property. The provisions of the Act apply:

> ". . . when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling, agricultural, or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid."[200]

It must be shown that "by reason of such military service the ability of such person to pay such tax or assessment is materially affected."[201] The court may stay any proceedings for sale for a period extending not more than six months after the termination of the period of military service.[202] A period of six months after the termination of the period of military service, but in no case later than six months after the date when the Act ceases to be in force, is given for the redemption of property sold for taxes.[203] This provision, however, "shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption."[204] Unpaid taxes or assessments shall bear interest until paid at the rate of six per cent per annum.[205] The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury are called upon by the requirements of the Act to give notice to persons in the military service of the benefits accorded in regard to taxes and assessments upon real property and of the action made necessary to claim the benefits allowed.[206]

B. *Public Lands*

It is provided that:

> "No right to any lands owned or controlled by the United States initiated or required under any laws of the United States, including the mining and mineral leasing laws, by any person prior to entering military service shall during the period of such service be forfeited or prejudiced by reason of his absence from

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[200] *Id.* § 500(1).
[201] *Id.* § 500(2).
[202] *Ibid.*
[203] *Id.* § 500(3).
[204] *Ibid.*
[205] *Id.* § 500(4).
[206] *Id.* § 500(5).

> the land or his failure to perform any work or make any improvements thereon or his failure to do any other act required by or under such laws."[207]

Under the Act, following this broad statement of protection, specific protection is given in regard to homestead entry and settlement claims,[208] desert-land entry,[209] mining claims,[210] mineral leases on public lands,[211] perfection of rights during military service,[212] water rights,[213] leave of absence to do farm labor (in the event the United States is engaged in war) to be counted as constructive residence under homestead entry requirements,[214] rights of men under twenty-one in military service,[215] and benefits of citizens in allied armies.[216]

C. *Income Taxes*

Unlike the 1918 Soldiers' and Sailors' Civil Relief Act, the 1940 Act provides for deferment of income taxes. Section 513 of the 1940 Act reads:[217]

> "The collection from any person in the military service of any tax on the income of such person, whether falling due prior to or during his period of military service, shall be deferred for a period extending not more than six months after the termination of his period of military service if such person's ability to pay such tax is materially impaired by reason of such service. . . ."

No interest on unpaid income tax and no penalty for nonpayment of income tax may accrue for the period of deferment.[218] Moreover, the running of any statute of limitations against the collection of such tax by distraint or otherwise is suspended for the period of military service and for an additional period of nine months beginning with the day following the period of military service.[219] The provisions of the Act do not apply to the income tax on employees imposed by the Federal Insurance Contributions Act.[220]

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[207] *Id.* § 501(1).
[208] *Id.* § 502.
[209] *Id.* § 504.
[210] *Id.* § 505.
[211] *Id.* § 506(1).
[212] *Id.* § 507.
[213] *Id.* § 508.
[214] *Id.* § 510.
[215] *Id.* § 511.
[216] *Id.* § 512.
[217] *Id.* § 513.
[218] *Ibid.*
[219] *Ibid.*
[220] *Ibid.* See FEDERAL INSURANCE CONTRIBUTIONS ACT, 53 STAT. 1381 (1939), 26 U.S.C.A. § 1400 (1940).

Administrative Remedies

Article VI, the last article of the 1940 Soldiers' and Sailors' Civil Relief Act, provides certain necessary administrative remedies. There shall be no transfers of rights to gain benefits of the Act;[221] certification as to persons in military service must be accomplished by certain designated officials,[222] interlocutory orders may be revoked, modified, or extended by any court upon due notice to the parties;[223] a saving clause, in the event any provision of the Act should be declared invalid, is included;[224] and finally: the Act expires May 15, 1945, unless the United States is then engaged in war, in which case the act "shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter";[225] and the provisions of the Soldiers' and Sailors' Civil Relief Act of 1918 become inapplicable with respect to any military service performed after the date of the 1940 Soldiers' and Sailors' Civil Relief Act.[226]

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[221] S&S Act § 600. See Lima Oil & Gas Co. v. Pritchard, 92 Okla. 113, 218 Pac. 863 (1923).

[222] S&S Act § 601(1).

[223] *Id.* § 602.

[224] *Id.* § 603.

[225] *Id.* § 604.

[226] *Id.* § 605; see § 4 of the joint resolution approved Aug. 27, 1940 (Public Resolution Number 96, Seventy-sixth Congress), 54 Stat. ..... (1940), 50 U.S.C.A. § 401 (Supp. 1940), and § 13, Selective Service and Training Act of 1940, 54 Stat. ..... (1940), 50 U.S.C.A. § 313 (Supp. 1940).

APPEALS AND JUDICIAL REVIEW UNDER THE MISSISSIPPI UNEMPLOYMENT COMPENSATION LAW

*Joseph A. Todd**

The Mississippi Unemployment Compensation Law[1] was enacted by the 1936 Regular Session of the Mississippi Legislature and became effective on April 1st of that year. As set forth in the legislature's declaration of public policy, the purpose of this Act was the "Compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own,"[2] and provision was made for the issuance of weekly checks to jobless workers who had been working for the larger employing units in the State. Benefits have been payable to eligible claimants since April 1, 1938, and slightly less than $6,000,000 has been disbursed from the reserve fund to date.

The Mississippi Act was designed to fit into the pattern laid down in the Federal Social Security Act[3] and made a clear break with the "relief" principle of aiding the unemployed. The "insurance" principle was substituted and benefits were made payable in accordance with the individual's work record and his present relation to the labor market, rather than the urgency of his "need." Benefits are paid as of "right" to all persons properly qualified. The requirements which the claimant must satisfy, other than those concerning his work record in covered employment, are:

(1) He must be unemployed,[4] (2) He must be able to work; (3) He must be available for work; (4) He must file and continue his claim in the manner prescribed by the Rules and Regulations of the Unemployment Compensation Commission.

In addition to these general qualifications, benefits are not payable immediately if the claimant was (a) discharged for misconduct directly

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Although the writer wishes to acknowledge the assistance and information which made this article possible, all of the opinions expressed herein are his own and in no way reflect the views or policy of the Unemployment Compensation Commission.

[1]Miss. Code Ann. (Supp. 1938) §§ 2760-2832, *as amended by,* Miss. Laws 1940, c. 295 [Miss. Laws 1936, c. 176, *as amended by,* Miss. Laws 1st Ex. Sess. 1936, c. 3, Miss. Laws 1938, c. 147, Miss. Laws 1940, c. 295].

[2]Miss. Code Ann. (Supp. 1938) § 2761 [Miss. Laws 1936, c. 176, § 2].

[3]49 Stat. 620 (1935), 42 U.S.C.A. c. 7 (Supp. 1940). See particularly Title III, setting forth the conditions for administrative grants-in-aid, and Title IX, which levies an excise tax of 3% on the payrolls of employers of eight or more persons, unless engaged in employment expressly exempted.

[4]He may still be eligible, though for reduced payments, even if employed part-time. See amendments of 1940 Legislature, relative to partial unemployment, Miss. Laws 1940, c. 295, §§ 3-4.

connected with his work; (b) voluntarily quit his job without good cause; or (c) if he refuses suitable work when it is offered. The penalties in such cases range from one to seven weeks delay in beginning the payment of benefits, in addition to the usual waiting period of two weeks.

A claimant is also ineligible if his unemployment is due to a current stoppage of work caused by a labor dispute in which he is interested, either directly or because he belongs to a grade or class of workers whose interests are involved.[5]

With the exception of matters involving the existence of a labor dispute, which must be considered by the Commission itself, all decisions with reference to claims for benefits are made by Claim Examiners in the Central Administrative Office at Jackson. In making initial determinations the administrative agency is of necessity left free to give meaning to such terms as "able to work," "available for work," "misconduct directly connected with work," "suitability of work offered,"[6] and to determine what constitutes "good cause" for voluntarily quitting. These are practical matters of fact and circumstance. Their treatment demands practical methods, and the value of the entire program depends to a very large degree upon the promptness of payment when due, since payment is intended to begin almost immediately after regular wages cease and can only be continued for a relatively short time.[7]

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[5]Miss. Laws 1940, c. 295, § 5(d), provides that benefits shall be denied, "For any week with respect to which the Commission finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at a factory, establishment, or other premises at which he is or was last employed: Provided, that this subsection shall not apply if it is shown to the satisfaction of the Commission—(1) He is unemployed due to a stoppage of work occasioned by an unjustified lock-out; provided however, such lock-out was not occasioned or brought about by such individual acting alone or with other workers in concert; or (2) He is not participating in or directly interested in the labor dispute which caused the stoppage of work; and (3) He does not belong to a grade or class of workers of which, immediately before the commencement of stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute: Provided, that if in any case separate branches of work which are commonly conducted as separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed a separate factory, establishment, or other premises."

[6]Miss. Laws 1940, c. 295, § 5(c-1), requires that in determining whether or not the work offered is "suitable" the Commission "shall consider among other factors the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence." Neither shall work offered be deemed suitable (1) if the position offered is vacant due directly to a strike, lock-out, or other labor dispute; (2) if the wages, hours, or other conditions of the work offered are substantially less favorable than those prevailing for similar work in the locality; (3) if the claimant would be required to join a company union, or resign from or refrain from joining any bona fide labor organization.

[7]No more than fourteen weekly checks for his full benefit amount may be issued in any benefit year.

Since the Act establishes a right to benefits, it was recognized that individuals whose claims were disallowed, either in whole or in part, should have recourse from adverse administrative determinations. Likewise, the interest of employers in the efficient administration of the program was clear, because their payments into the reserve fund make benefits possible.[8] Direct appeal to the ordinary courts would mean greatly increased dockets, already overcrowded, and unavoidable delays. Consequently, quasi-judicial machinery was established, separate from both the administrative agency and the courts, but with provision for judicial review of final determinations on all questions of law.

By this arrangement many inconsequential controversies are settled quickly and with much less expense than court action would necessitate; while still permitting general judicial control over administrative determinations by preventing the application of clearly wrong constructions and principles of law.

Authority is granted by Section 10(f) to establish a three member Board of Review.[9] This body has jurisdiction over all appeal matters, including the adoption of regulations as to the manner in which appealed claims may be presented and for the conduct of hearings on such appeals. These regulations do not have to conform to "common law or statutory rules of evidence and other technical rules of procedure," but must be adequate for "determining the rights of the parties."[10]

The Board of Review is authorized to appoint such Appeal Tribunals as may be needed. These tribunals may consist of a single Referee, or be composed of three members, one being a Referee to act as chairman, one member to represent employers, and one to represent employees. It has been necessary to appoint only one Appeal Tribunal. A single Referee, Mr. Elmer S. McIntyre of Jackson, serves part-time in this capacity.

The Board of Review, or the Referee, is granted authority to compel the attendance of witnesses, or the production of records deemed necessary as evidence in connection with a disputed claim.[11] In giving testimony, or producing subpoenaed documents, protection against self-incrimination is provided.[12]

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[8]The right of an employer to judicial review is questioned, but not his right to administrative remedy before the Appeal Tribunal by Pennock, *Unemployment Compensation and Judicial Review* (1939) 88 U. of Pa. L. Rev. 137.

[9]At present, Mr. Curran W. Sullivan, Hattiesburg attorney, is Chairman, Associate Members are Mr. Hermon Dean, Canton attorney, and Mr. B. F. Pullen, Jackson, representing labor.

[10]Miss. Laws 1940, c. 295, § 6(f).

[11]*Id.* § 11(j).

[12]*Id.* § 11(l).

Appeals from the decisions of Claim Examiners or the Commission are filed in accordance with the regulations adopted by the Board of Review, which merely require that notice of such appeal be filed at one of the offices of the Mississippi State Employment Service, or with an itinerant interviewer, if the county has no full time office. Although the person receiving the appeal notice in the local office assists in setting forth the grounds upon which the appeal is based, the Board of Review cannot refuse to hear the protest because the appeal notice is inadequate in form or lacking in detail, provided the time allotted for appeal has not expired. Appeals may be filed by the claimant, or any party,[13] within seven days after being notified of the Examiner's decision, or the date upon which such notice was mailed to his last known address.

When the appeal notice is received in the Central Administrative Office it is transmitted, together with an epitome of the information contained in the Commission's files, to the chairman of the Board of Review. The case may be heard by the full Board, or may be handed down to the Referee, at the chairman's discretion. The procedure is the same whether heard by the Board of Review or the Referee.

Section 6(c) requires the Appeal Tribunal, "after affording the parties reasonable opportunity for fair hearing," to affirm or modify the original determination in all its particulars. By Regulation, seven days notice of hearing is required, unless such notice is waived by all parties to the hearing. Parties entitled to notice of hearing are the appellant and the last employer, or the claimant, if the appellant is the last employer.

Hearings are scheduled at the time and place deemed most convenient for the parties, and may be adjourned for the taking of additional evidence at other times and places, if the Appeal Tribunal thinks such action expedient. A full and complete record of all proceedings must be kept. All testimony must be taken down, but need not be transcribed unless the claim is further appealed.[14] All testimony is given under oath. Within seven days after the hearing has been concluded, the Appeal Tribunal must render a decision, giving notice to the parties and placing a copy on file for inspection at the office of the Commission. The opinion must contain the order for disposition of the claim, the rule of law followed, and other reasons for the decision.

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[13]"Interested parties" have been limited to "the claimant, the claims examiner whose determination has been appealed from, and the claimant's last employer, and any other person whose interests may be proximately affected." See *Board of Review Regulation* D-5.

[14]As a general practice, however, all testimony has been transcribed and kept on file at the Commission's office.

The jurisdiction of the Board of Review is continuous once an appeal is received, even though the case be sent to the Referee. The Act provides that the Board of Review "may remove to itself or transfer to another Appeal Tribunal the proceedings on any claim pending before an Appeal Tribunal."[15] It may also affirm, modify, or set aside any decision of an Appeal Tribunal on its own motion.[16] Any person is prohibited from participating on behalf of the Commission or Board of Review in any case in which he is an interested party.

As soon as the Appeal Tribunal, or the Board of Review, has rendered its decision, further appeal may be initiated. If the matter was heard by the Referee, ten days are allowed for petition to the Board of Review. When such appeal is sought, the Board of Review may grant review to any of the parties, and in practice does so; but it is required by law to permit such further appeal by any of the parties only when a decision of an Appeal Tribunal was not unanimous,[16] or when the decision of an Examiner was overruled or modified. When such further appeal is granted by the Board of Review, it may proceed with the taking of additional evidence, permit oral argument, decide the matter on the basis of stipulated facts agreed to by all parties, or upon the record made by the Referee.[17] If no review of the Referee's decision is sought within ten days, his decision is deemed to be the final decision of the Board of Review.

Judicial review of final determinations of the Board of Review may be secured by any "party aggrieved thereby." Such action lies against the Commission and may be brought in the circuit court of the county in which the plaintiff resides. Any other party to the proceedings before the Board of Review is also made a defendant. Such judicial review as is provided is not permitted unless the plaintiff has exhausted all administrative remedies, which means that only final determinations of the Board of Review are subject to review, and that relief must first be sought before the Board of Review from decisions of the Referee. Appeals may be filed by the Commission from decisions involving questions of law.[18] In such

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[15]Miss. Laws 1940, c. 295, § 6(e).

[16]*Ibid.*

[17]*Board of Review Regulations* C-3.

[18]See discussion of Miss. Unemployment Compensation Comm. v. Barlow, 1 So. (2d) 241 (Miss. 1941), cited in note 21 *infra*. Such appeals are heard in the same manner as that provided for review sought by an aggrieved party. The controlling provisions with respect to procedure in court review are found in Miss. Laws 1940, c. 295, § 6(i): "In such action, a petition which need not be verified, but which shall state the grounds upon which a review is sought, shall be served upon the Commission, or upon such persons as the Commission may designate, and such service shall be deemed completed service on all parties. . . . With its answer, the Commission shall certify and file with said Court all documents and papers and a transcript of all testimony taken in the matter, together with the Board of Review's findings of

cases the Commission is represented by its own counsel[19] or by the attorney general, if his services are requested by the Commission.

Judicial review is limited to questions of law. The findings of the Board of Review as to the facts are conclusive, provided the findings are supported by evidence and fraud is not present. Because of the importance of promptness in obtaining final rulings on appealed questions, petitions for judicial review are given precedence over all other civil cases and are heard summarily. It is expressly provided that appeals to the Supreme Court of Mississippi may be taken in the same manner as in other civil cases.[20]

The right of the Commission to appeal in its own behalf has recently been upheld by the Supreme Court in the case of *Mississippi Unemployment Compensation Comm. v. Barlow*.[21] It was held that the Commission has the right to appeal to the Supreme Court from any judgment against it by the circuit court, it being construed that any ruling of the circuit court altering an Examiner's decision, or the final determination of the Board of Review, in a particular case was an action against the Commission.

Barlow appealed from the Examiner's decision disallowing his claim and refusing to backdate it to a previous date upon which he had made inquiry as to his status, it being his contention that he was erroneously informed by a representative of the employment service as to his eligibility, and therefore did not file claim for benefits at that time. The Referee ordered the claim backdated and benefits paid, on the ground that the claimant should not be made to suffer because of a mistake made by an employee of the administrative agency.[22] The Examiner appealed to the Board of Review, which reversed the Referee[23] because of the specific provisions of the statute requiring claimants to file their claims in accordance with the regulations of the Commission and the absence of any exception to this requirement.[24]

Petition for review was filed by Barlow with the Circuit Court of Lauderdale County, as a result of which the order of the Board of Review

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fact and decision therein. . . . It shall not be necessary, in any judicial proceeding under this section, to enter exceptions to the rulings of the Board of Review and no bond shall be required for entering such appeal."

[19]Mr. Harry M. Bryan is General Counsel, Mr. Henry Edmonds, Assistant Counsel.

[20]Miss. Laws 1940, c. 295, § 6.

[21]1 So. (2d) 241 (Miss. 1941).

[22]6-R-40.

[23]6-BR-40.

[24]Miss. Laws (1940), c. 295, §§ 4, 6.

was set aside and the position taken by the Referee was affirmed.[25] From this decision an appeal was filed by the Commission before the Supreme Court, and the opinion of the court referred to here was rendered on motion by Barlow's counsel to dismiss for want of right in the Commisssion to appeal, and on other grounds.

A recent ruling of considerable importance was made in the case of *Dixie Greyhound Lines, Inc. v. Mississippi Public Service Comm.*,[26] decided February 24, 1941. This opinion develops very fully the court's position with reference to the review of administrative determinations. In a previous decision[27] it had been held that the circuit court had been correct in refusing to review a decision of the Railroad Commission on the ground that the order of the Commission was legislative and administrative, not judicial, and therefore not the proper subject for judicial cognizance. In the more recent case the correctness of the circuit court's action in refusing *certiorari* in the earlier case is reaffirmed, but it is pointed out that the legislature has authority to provide direct appeal and that such direct appeal had been so authorized for the Public Service Commission.[28] In the *Barlow* case the court merely approved the method of appeal provided by the statute without finding it necessary to consider the general law on the question.

In support of its opinion in the *Dixie Greyhound* case, the Court refers to Section 156 of the Mississippi Constitution of 1890[29] and leading cases decided by the United States Supreme Court, particularly *Interstate Commerce Comm. v. Illinois Cent. R.R.*,[30] and *Interstate Commerce Comm. v. Union Pacific Ry.*[31] The sense of these opinions is that the court is required to examine administrative findings, properly presented for review, only to decide whether the agency was acting within the scope of its delegated authority, or to ascertain that its order is supported by substantial evidence and is not an arbitrary and capricious exercise of power. This reasoning appears applicable to Unemployment Compensation appeals, al-

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[25]Docket No. 3699. Before rendering a decision the court remanded the case to the Board for hearing of additional evidence.

[26]200 So. 579 (Miss. 1941).

[27]Dixie Greyhound Lines, Inc. v. Miss. R.R. Comm., 174 Miss. 1. 163 So. 443 (1935).

[28]See Miss. Laws 1938, c. 139, § 10, c. 142, § 28. These sections are identical and state in part, "In addition to other remedies now available, the state, or any party aggrieved by any final finding, order, or judgment of the Commission, shall have the right, regardless of the amount involved, of appeal to the first judicial district circuit court of Hinds County."

[29]"The Circuit Court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other Court, and such appellate jurisdiction as shall be prescribed by Law." MISS. CONST. § 156.

[30]215 U. S. 452, 30 Sup. Ct. 155, 54 L. ed 280 (1910).

[31]222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308 (1912).

though the language of the statute and the special tribunals established indicate that final determinations of the Board of Review will be difficult to overthrow on either of these grounds. Findings of fact "supported by evidence" are conclusive, and remedy by judicial review can only be sought when erroneous interpretations are posited; while if there should be improper rulings by an Examiner involving caprice or fraud, such action will quite probably be detected and remedied by the independent Appeal Tribunal in the initial appeal stage.

Three other petitions for judicial review have been filed. One of these was concerned with the existence of a labor dispute and its effect on the payment of benefits as set forth in Section 5(d).[32] The court ruled that the stoppage of work at the Berthadale Mills was due to its financial condition rather than to a labor dispute growing out of company proposals for changes in the then existing contract with the Union. The Commission and the Board of Review had taken the latter view and benefits had been denied.[33] In its opinion the court said, in part:

> "The Commission is not a judicial but an administrative body and to it is committed the administration of funds provided under the unemployment compensation law, unhampered by technical rules of procedure or evidence. Likewise, the Board of Review, to which claimants for benefits may appeal for adjudication, is unfettered by such rules, but the conduct of its hearings shall be in accordance with regulations prescribed by the Board of Review for determining the rights of the parties. . . .
>
> "But Courts are judicial tribunals. When a case is appealed to the Circuit Court the findings of fact are conclusive only when supported by evidence and this evidence must be substantial, competent and relevant, such as would support the findings of fact by a jury. *Edison* case, 59 Sup. Ct. 206 (1938). Findings of fact in this State must be based upon substantial evidence, competent and relevant, and when an appeal from Board of Review reaches the judicial stage that is the only standard by which to judge the evidence that can support the findings of such Board."

If the court is to examine the competency and relevancy of all evidence before the Board of Review to the extent necessary to apply the test of substantial evidence here laid down, it is quite probable that petitions for judicial review will become more numerous, because the informal procedures necessary for the efficient and economical function of Appeals

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[32]Jones v. Miss. Unemployment Compensation Comm., Docket No. 2105, Circuit Court of Pike County.

[33]1-BR-39.

Tribunals do not tend to produce a record readily adaptable to such scrutiny.

The other two cases are before the court. One is an appeal from a ruling of the Board of Review that for the purposes of the Unemployment Compensation Law drivers of taxicabs are employees of the cab company operating the terminal, whether such cabs are owned by their respective operators, the cab company, or other parties,[34] following the decision of the Supreme Court of Mississippi in the case of *Meridian Taxicab Co. v. Ward*.[35] In the other case an employer is appealing from a decision of the Board of Review which holds that a mere transfer of title to a part of his business by an individual to his wife, not accompanied by any change in management or control, does not effect a change in the individual's status as a covered employer.[36]

Another matter is pending before the Chancery Court of Pearl River County which concerns the appeals function, although it is not a petition for judicial review.[37] The action was brought by the Board of Review as a result of one Williams' refusal to produce certain records for the production of which subpoenas had issued from the Board of Review. The question raised is a vital one, although the language of the statute and the intent of the legislature to confer such power seems clear.[38]

The work of the Appeal Tribunals has been increasing, and it may be expected to increase still more. In 1938 only seven appeals were heard by the Referee and only one by the Board of Review. In 1939 the Referee rendered 41 decisions, and the Board of Review rendered 22. During 1940, however, the Referee considered 71 cases, and 40 were heard by the Board of Review.

The question presented most often on appeal involved the status of claimants having some connection with farming operations.[39] In 1940,

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[34]18-BR-40 and Central Cab Co. v. Board of Review, Joseph Warren Beard, and Miss. Unemployment Compensation Comm. Docket No. 8993 in the Circuit Court of Warren County.

[35]184 Miss. 499, 186 So. 636 (1939).

[36]See 1-BR-41 and Avent v. Miss. Unemployment Compensation Comm. Docket No. 6206 in Circuit Court of Lafayette County. Miss. Laws 1940, c. 295, § 19(4-h) defines a covered employer as "Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection." Paragraph (1) of the subsection contains the provision with reference to number of employees required to constitute liability.

[37]Board of Review v. Williams, Docket No. 3770.

[38]Miss. Laws 1940, c. 295, § 11.

[39]The Board of Review early ruled that farming was a year-round occupation in this State and that any individual whose customary occupation was that of a farmer was not eligible for benefits, even during the winter months or the summer

39 of the Referee's decisions were concerned with such cases, and the Board of Review heard six appeals on similar questions.[40] Only two of the Board of Review cases were appeals from the Referee. The Referee's decision was sustained in one instance, and reversed in the other. Of the 39 appeals heard by the Referee, the Examiner was reversed in only nine instances.

The next largest group of cases arising before the Referee concerned definitions of covered employment. There were ten such appeals. Seven of them involved the determination of the status of individuals alleged to be working under arrangements which made them independent contractors, or agents, instead of employees on whose wages contributions were due. Three of these appeals were successful, it being ruled that a truck helper was the employee of the unit hiring the driver;[41] that timber cutters paid by the amount of timber cut were nevertheless employees;[42] and that under the specific conditions existing a life insurance agent was an employee, not an independent agent.[43]

The remaining cases before the Referee in 1940 were distributed as follows:

Appeals from disqualifications	15
Availability for work	5
Ability to work	5
Suitability of work offered	3
Discharged for misconduct	2
Alleging additional wage credits	4
Alleging employer liability	2
Involving Claims Procedure	1
Involving Seasonal Rules[44]	1

Other than the farming cases already mentioned, the Board of Review dealt with the following matters in 1940:

"lay-by" period, regardless of wage credits earned by him in covered employment. Such a general ruling necessitated clarification of its exact application to the variety of circumstances encountered.

[40]The 1940 cases are selected for analysis both because they are most numerous and because they appear most representative.

[41]31-R-40.

[42]36-R-40.

[43]56-R-40.

[44]There are special procedures regulating the payment of benefits to individuals whose wage credits were earned in industries declared by the Commission to be seasonal, after special hearing held for that purpose. Miss. Laws 1940, c. 295, § 3.

Appeals from disqualifications	6
Availability	3
Ability	1
Suitability of work offered	1
Voluntarily quit	1
Covered Employment	5
Involving Claims Procedure	2
Alleging employer liability	1
Total unemployment (other than farming)	1
Involving seasonal rules	1

Only nine of the Board of Review cases arose upon further appeal from the Referee's decisions; the remaining eleven were heard originally. Of nine Referee's decisions reviewed, four were affirmed and five reversed. Of the eleven cases heard originally, the Examiner was reversed in five instances, affirmed in five instances, and modified in one instance.

All of the appeals heard in 1940 were initiated by claimants. In two instances, however, the employer appealed from the final determination of the Board of Review. The effect of these rulings required the employer to pay contributions.[45] In no case since benefits became payable has an employer appealed from an Examiner's decision allowing benefits. In one instance the employer entered an appeal on behalf of a former employee who had been denied benefits.

Board of Review Regulation D-3(a) provides, in part, that "any individual may appear for himself or by his duly authorized representative in any proceeding before a Referee or the Board of Review." It is further provided that "any referee or the Board of Review, in their discretion, may refuse to allow any person to represent another in any proceeding before them whom they find to be guilty of unethical conduct, or who intentionally fails to observe the provisions of the Mississippi Unemployment Compensation Law, or the regulations and instructions of the Board of Review or the Unemployment Compensation Commission."

These regulations were adopted pursuant to Section 15(b) of the Unemployment Compensation Law, which forbids the charging of any fees in appeals provided for in the Act, except fees of "counsel or other duly authorized agent," in which case the fee must be approved by the Board of Review. The claimant was not represented by counsel in any of the proceedings before the Referee in 1940, and there were only two applications for fee filed with the Board of Review for representation of

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[45]See discussions of *Central Cab Co.* case and *Avent* case cited in notes 34 and 35, respectively, *supra.*

claimants in its proceedings. Employers were frequently represented, but counsel's fees do not have to be approved in such instances.

This analysis of the work of the appeals tribunals indicates that both the administrative agency and the appeals machinery is functioning efficiently. More than 13,000 initial claims were disallowed during 1940, and 3,867 disqualifications were assigned; whereas less than 100 appeals were filed. As has been noted, in a high percentage of these cases the Examiner's decision was affirmed; and all but 9 of the 71 cases heard by the Referee were settled in that initial stage. One of the reasons for this record lies in the adjustment procedure used, which permits a corrected determination to be issued before appeal is taken.

Section 6(b) of the Law provides that "an initial determination may for good cause be reconsidered." Decisions of the Examiner are delivered to the claimant at his local Employment Service office. If the decision is unsatisfactory in a manner which cannot be explained in the local office, application for reconsideration is filed, which results in an informal field investigation. Every effort is made to settle the matter at this point without the necessity of further proceedings. However, there is no impairment of appeal rights, and if the corrected determination is unsatisfactory to any of the parties, appeal may be initiated immediately.

The Commission also has continuous jurisdiction over benefit claims which have not been appealed. This permits corrections to be made in claims decisions even after the claim is terminated, if new facts are discovered, or the initial ruling is found to be erroneous.

THE RIGHT OF EXONERATION

*E. Kemp Cathcart**

The right of exoneration, although an old and familiar remedy,[1] is being more commonly used by compensated sureties and is becoming increasingly important.[2] The simplest way to get at the heart of this right is to submit a hypothetical case or cases, and then to apply the law to the hypothetical facts. With this in mind, we will suppose that a surety has executed a single bond in favor of an owner and on behalf of a contractor, the condition of which bond guarantees the completion of the contract and the payment of bills for material and labor. The contract obligates the contractor to pay for labor and material. We will further suppose that the contract has been completed, but that there is still a balance due to the contractor by the owner, the exact amount of which is in dispute, and which has been assigned by the contractor to a third party. There are due by the contractor bills for material and labor going into and forming a part of the contract, the amounts of which the contractor disputes. The surety would be liable for these bills if the amounts should prove correct and the contractor should fail to pay them. We will further suppose that the surety is afraid that if the balance under the contract is paid to the contractor, the contractor will not use it to pay the bills for material and labor; and that if the surety files a stop order with the owner and the contractor learns he cannot secure the balance due under the contract because of said stop order, he will refuse to sign the final papers, such as the final estimate, a release to the owner, or other such papers as may be required before final payment will be made.

From the hypothetical case, the unfortunate position in which the surety is placed can readily be seen. If it takes any action to tie up the funds, the contractor will not sign the necessary papers so that the fund can be paid; and if it fails to take such precautionary action, the contractor might obtain and misuse the balance due, thereby leaving the surety with

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[1]"Where although the surety is not troubled or molested for the debt, yet at the time after the money becomes payable on the original bond, this court will decree the principal to discharge the debt, it being unreasonable that a man should always have such a cloud hanging over him." Ranelaugh v. Hayes, 1 Vern. 189, 190, 23 Eng. Rep. 405, 406 (Ch. 1683).

[2]The importance of this right was recently emphasized by Alexander Foster, Jr., in his paper on *Exoneration of Surety* read before the meeting of the Federation of Insurance Counsel at Atlantic City, New Jersey, on August 30, 31, 1937, and appearing in (1937) Proceedings of Insurance Counsel 8, 13. See also Mason, *Exoneration of Surety* (1939) 6 Insurance Counsel Journal 21-22.

the liability for the material and labor bills. We will further suppose that the materialmen and laborers are demanding payment of their bills from the surety. Under these circumstances, what should the surety do? What can it do? What is its remedy? What are its rights?—A bill in equity seeking exoneration is the answer.[3]

Exoneration is a well-known equitable remedy. It is a right that is broad, flexible, and elastic, a right for a surety and by a surety.[4] It is a right whereby the surety can seek the aid of a court of equity because it fears some future probable injury and not because some injury has already occurred which requires immediate compensation or relief;[5] a right whereby the surety can enjoin its principal,[6] marshal his assets,[7] garnishee his property, appoint a receiver,[8] set aside transfers of property,[9] trace assets, and have the priorities of the principal's creditors determined; and a right whereby the surety can cause its principal, or its principal's estate,[10] to pay before *it* must pay—a right that does, in fact, give relief from a burden.[11]

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[3]"No principle in equity is more familiar, or more firmly established, than that a surety, after the debt for which he is liable has become due, without paying or being called on to pay it, may file a bill in equity in the nature of a bill *quia timet* to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby." 21 R.C.L. 1110, § 146. See also Union Trust Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. ed. 825 (1887); Republic Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co., 68 F.(2d) 445 (C.C.A. 5th, 1934); West Huntersville Cotton Mills Co. v. Alter, 164 Ala. 305, 51 So. 338 (1910); Foster v. Bradney, 143 Ark. 319, 220 S.W. 811 (1920); Boston Woven Hose Co. v. Kendall, 178 Mass. 232, 59 N.E. 657, 51 A.L.R. 781 (1901); 2 STORY, EQUITY JURISPRUDENCE (4th ed. 1918) § 860.

[4]American Surety Co. of New York v. Lewis State Bank, 58 F.(2d) 559 (C.C.A. 5th, 1932); Glades County v. Detroit Fidelity and Surety Co., 57 F.(2d) 449 (C.C.A. 5th, 1932); Alabama Bank & Trust Co. v. Gainer, 225 Ala. 269, 142 So. 568 (1932); Parker v. Wheeler, 47 Ohio App. 301, 191 N.E. 798 (1934).

[5]American Surety Co. of New York v. Lewis State Bank, 58 F.(2d) 559 (C.C.A. 5th, 1932); Alabama Bank & Trust Co. v. Gainer, 225 Ala. 269, 142 So. 568 (1932); Woodward v. Hollis, 93 Colo. 17, 226 P.(2d) 862 (1933); Saunders v. Saunders, 49 Idaho 773, 291 Pac. 1069, 71 A.L.R. 350 (1930); CLARK, PRINCIPLES OF EQUITY (1937) § 55.

[6]Glades County v. Detroit Fidelity & Surety Co., 57 F.(2d) 449 (C.C.A. 5th, 1932); Searcy v. Shows, 204 Ala. 218, 85 So. 444 (1920); Leach v. Bassman, 208 Iowa 1374, 227 N.W. 339 (1929).

[7]Cloud v. Middleton, 241 Ky. 595, 44 S.W.(2d) 559 (1932).

[8]Central Surety & Ins. Corp. v. Bagley, 44 F.(2d) 808 (S. D. Cal. 1930); Roberts v. American Bonding & Trust Co., 83 Ill. App. 463 (1889); 21 R.C.L. 1114, § 150.

[9]Cloud v. Middleton, 24 Ky. 595, 44 S.W.(2d) 559 (1932); Samples v. Rogers, 32 Ky. L. Rep. 784, 107 S.W. 222, 71 A.L.R. 354 (1908). *Contra:* Saunders v. Saunders, 49 Idaho 733, 291 Pac. 1069, 71 A.L.R. 350 (1930), (1931) 40 YALE L. J. 485.

[10]BISPHAM, PRINCIPLES OF EQUITY (10th ed. 1922) 538, § 332.

[11]"If the principal is solvent, the decree need not go further than to require the principal to pay, but when he is fraudulent, insolvent, or has absconded, the equity of exoneration needs and may have further protection. Injunctions, receivers, and equitable garnishments have been granted, property recovered from third parties, and funds traced and applied." Glades County v. Detroit Fidelity & Surety Co., 57 F.(2d) 449, 452 (C.C.A. 5th, 1932).

Such a right should afford full relief in the hypothetical case given. The relief needed in such case is (1) a determination of the amount due the contractor by the obligee; (2) a determination of the rights of third parties claiming an interest in the fund; (3) a determination of the amounts due by the contractor to the materialmen and laborers; (4) a decree that the money due the contractor must be paid either by the owner or the contractor to the materialmen and laborers before the surety can be required to pay such materialmen and laborers, to whom it is ultimately liable; and (5) a deficiency decree entered against the principal and the indemnitor or indemnitors, if any, in favor of the surety for any deficit between the sum decreed due by the owner to the contractor and the sums decreed due by the contractor to materialmen and laborers. The right of exoneration will give this relief.

When a court of equity takes jurisdiction of a bill asking for exoneration, it has the power to afford all equitable relief required;[12] and if, as stated in the hypothetical case, the contractor refuses to execute the necessary documents to obtain the balance found due under the contract, the court has the power to grant a mandatory injunction or appoint a receiver to act for the contractor.[13] A bill in equity seeking exoneration offers the best solution of the problem presented.

Certain allegations in the bill are necessary or desirable. It should be alleged (1) that there is no adequate existing remedy at law;[14] and (2) that as between the complainant, the surety, and the principal, the surety's liability is secondary and the principal's primary.[15]

It must also be alleged (3) that the surety fears injury.[16] It is sometimes said, however, that it is not necessary that the surety show any special reason for his fear.[17] It is also not necessary that any fraudulent disposition of property on the part of the principal be shown.[18]

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[12]Ricker v. Ricker, 248 Mass. 549, 153 N.E. 539 (1926); Comstock v. Corbin, 191 Mich. 639, 158 N.W. 106 (1916); Neal v. Buffington, 42 W. Va. 327, 26 S.E. 172 (1896); Dobie v. Fidelity Co., 95 Wis. 540, 70 N.W. 482 (1897); Hamilton v. City of Fond Du Lac, 25 Wis. 490 (1870); 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 186; 4 WILLISTON, CONTRACTS (Rev. ed. 1936) 1264.

[13]American Surety Co. of New York v. Lewis State Bank, 58 F.(2d) 559, (C.C.A. 5th, 1932); Southwestern Surety Ins. Co. v. Wells, 217 Fed. 294 (E. D. Pa. 1914); Alabama Bank & Trust Co. v. Gainer, 225 Ala. 269, 142 So. 568 (1932); Saunders v. Saunders, 49 Idaho 773, 291 Pac. 1069, 71 A.L.R. 350 (1930).

[14]19 AM. JUR. 56, § 29; STAFFORD, HANDBOOK OF EQUITY (1934) 423.

[15]Holcombe v. Fetter, 70 N. J. Eq. 300, 67 Atl. 1078 (1905).

[16]Tillis v. Folman, 145 Ala. 176, 39 So. 913 (1906); Hutchinson Wholesale Grocery Co. v. Brand, 79 Kan. 340, 99 Pac. 292 (1909); Aley v. Cooley, 53 S. C. 44, 31 S.E. 634 (1898).

[17]See 21 R.C.L. 1111, § 146.

[18]Hutchinson Wholesale Grocery Co. v. Brand, 79 Kan. 340, 99 Pac. 292 (1909); 21 R.C.L. 1111, § 146.

It must be stated (4) that the debt has matured.[19] It is also probable that there should be an allegation that the debt is presently enforceable against the surety. The text writers and decisions generally seem to require such an allegation.[20] However, the case of *Maryland Casualty v. Morley Construction Co.* seems to indicate that it is unnecessary. In that case the surety asked in the alternative for exoneration, specific performance of a contract providing for a certain joint control fund, and subrogation. The United States District Court for the Western District of Missouri denied the request for specific performance of the joint control contract and denied subrogation, but granted the surety the relief of exoneration. This relief was given, although at the time the bill in equity of the surety was filed, the six months' period from the date of the final settlement of the contract had not expired, and until such expiration of time, the surety under the provisions of the old Heard Act could not have been sued. Consequently the debt was not presently enforceable against the surety. Appeal was taken by Morley to the Circuit Court of Appeals for the Eighth Circuit, but no cross-appeal was taken by the surety. The Appellate Court reversed the District Court's action in granting the relief of exoneration to the surety,[21] preferring to grant relief on other grounds, because there was no enforceable action against the surety at the time its bill was filed. The relief granted was specific performance of the contract, although no cross-appeal had been filed by the surety. Morley again appealed, this time to the United States Supreme Court, which reversed the Circuit Court of Appeals, holding that the Appellate Court lacked the power to grant relief on the theory of specific performance in the absence of a cross-appeal by the surety, and remanded the case to the Circuit Court of Appeals for a definite decision on the right of the surety to exoneration.[22] Apparently the Circuit Court of Appeals felt that the equities of the case were with the surety and wanted to grant some equitable

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[19]"Before maturity of the debt or accrual of liability the surety has no right of action in equity to be indemnified against apprehended danger of loss by reason of his undertaking. After maturity, however, although he has not been troubled by the creditor, he has the right, before payment, to go into a court of equity, at any time, to compel payment of the debt by the principal, or from the estate of the principal, or to be secured against loss. The doctrine in such cases rests upon the simple right, as between the principal and surety, that the surety has to be protected by the principal." 50 C. J. 244, § 396. In West Huntsville Cotton Mills Co. v. Alter, 164 Ala. 305, 51 So. 338, 339, (1910), the court said: "No principle of equity is more familiar, or more firmly established, than that a surety *after the debt for which he is liable has become due,* without paying or being called on to pay it, may file a bill in equity to compel the principal debtor to exonerate him from liability by its payment." (Italics added). See also CLARK, PRINCIPLES OF EQUITY (1937) § 453.

[20]West Huntsville Cotton Mills Co., 164 Ala. 305, 51 So. 338 (1910); Reeder v. Union Trust Co., 26 Pa. Dist. Rep. (1917); ARANT, SURETYSHIP (1931) 319, § 72.

[21]84 F.(2d) 522 (C.C.A. 8th, 1936).

[22]300 U. S. 185, 57 Sup. Ct. 325, 81 L. ed. 593 (1937).

relief; but in the light of its former opinion, it was confronted with a difficult situation. It wrote a new opinion[23] affirming the trial court's action in allowing relief on the theory of exoneration, withdrawing any inconsistency in its former decision overruling the District Court. Morley thereafter filed a petition for a writ in the United States Supreme Court, which was denied.[24]

The bill should also allege (5) that the principal is in default and has failed to pay at maturity[25] and (6) that a valid suretyship obligation exists.[26] It has been suggested that the necessity for the allegation admitting a suretyship obligation is one objection to a proceeding seeking exoneration. However the advantages of such a bill are much greater than the burden of such an admission.

The allegations specified are sufficient to give the court jurisdiction. However, there is a difference of opinion concerning the necessary allegations. The *Encyclopedia of Pleading & Practice*[27] says it is necessary to allege: (1) irretrievable injury; (2) insufficiency of pecuniary satisfaction; and (3) inexpediency of ceaseless litigation; and some counsel feel it is necessary to allege that collection can be made from the principal and that recourse to the surety is, therefore, unnecessary.[28] While these additional allegations may be unnecessary, if the facts of any case support them, they should by all means be included as additional bases for the court's taking jurisdiction.

There is authority for the proposition that there must be a fund present which may be dissipated if equity does not lend its aid.[29] Where a corporate surety seeks exoneration there is usually a fund present which is the very reason why the surety seeks exoneration instead of paying and pursuing its subrogation rights. There is also authority supporting the proposition that a surety may have exoneration to force a principal to pay

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[23]90 F.(2d) 976 (C.C.A. 8th, 1937).

[24]302 U. S. 747, 58 Sup. Ct. 265, 82 L. ed. 578 (1937).

[25]American Bonding Co. v. Logansport Gas Co., 95 Fed. 49 (C.C.R.I. 1899); Beaver v. Beaver, 23 Pa. 167 (1854).

[26]Cattling v. Otis Elevator Co., 214 Mass. 294, 101 N.E. 367 (1913); St. Croix Timber Co. v. Joseph, 142 Wis. 55, 124 N.W. 1049 (1910).

[27]3 Encyclopedia of Pleading and Practice (1895) 599.

[28]Mason, *Exoneration of Surety* (1939) 6 Insurance Counsel Journal 21. See also Woodward v. Hollis, 93 Colo. 17, 22 P.(2d) 862 (1933).

[29]"True indeed, it is that the surety is a favorite of equity and that he may, if he fears, secure its aid before he pays as certainly as he may be subrogated after he pays. But the essence of such relief is a clear conscience and the certainty of an unassailable fund." Johnson v. Thomas, 16 F. Supp. 1013, 1018 (S. D. Tex. 1936). See also American Surety Co. v. Lewis State Bank, 58 F.(2d) 559 (C.C.A. 5th, 1932); Glades County v. Detroit Fidelity & Surety Co., 57 F.(2d) 449 (C.C.A. 5th, 1932.)

the debt out of his general assets to save the surety from payment.[30] These decisions proceed upon the theory that it is not just that the assets of the surety be depleted to satisfy the principal's debt.[31] The question arises as to whether this right, under such circumstances, is equally available to a compensated surety. Such surety, having accepted a premium for undertaking the suretyship and being in the business of writing surety bonds for profit, does not need the same protection that an individual surety might need to protect inroads into his assets for the payment of a claim which in equity and good conscience should be borne by another.[32] Today the equity court might hold that the surety, if solvent, should be forced to pay at once, and to seek reimbursement thereafter from its principal. The court will aid it by extending subrogation to all the rights, remedies, and liens of the creditor.[33] It is necessary that special circumstances intervene which present a situation to the court whereby the surety cannot obtain adequate protection by paying and proceeding to recover through subrogation, but needs the aid of the equity court to prevent a miscarriage of justice.[34] Such special circumstances may consist of: the presence of a fund out of which the claims should in equity be paid; perhaps the insolvency of the principal; the dissipation of property by the principal; or the manipulation of property to place it beyond the surety's reach.[35]

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[30]" . . . and the creditor, being first fully indemnified, subjected to no delay, and exposed to no risk of loss, may upon such a bill be compelled to resort to the property of the principal for the satisfaction of his claim before coming upon the surety." SHELDON, SUBROGATION (2d ed. 1893) § 30, 195. See also Williams v. Coleman, 70 Cal. App. 400, 233 Pac. 397 (1925); Sanford v. U. S. F. & G. Co., 116 Ga. 689, 43 S.E. 61 (1903); Thompson v. Taylor, 72 N. Y. 32 (1878); Ranelaugh v. Hayes, 1 Vern. 189, 23 Eng. Rep. 405 (Ch. 1683). In Admiral Oriental Lines v. United States, 86 F.(2d) 201, 204 (C.C.A. 2d, 1936), the court said: "In equity, however, the rule is otherwise; before paying the debt a surety may call upon the principal to exonerate him by discharging it; he is not obliged to make inroads into his own resources when the loss must in the end fall upon the principal." Sanford v. U. S. F. & G. Co., 116 Ga. 689, 43 S.E. 61 (1903).

[31]Sturdyvin v. Ward, 336 Ill. 594, 168 N.E. 666 (1929); Holcombe v. Fetter, 70 N. J. Eq. 300, 67 Atl. 1078 (1907).

[32]See Claffin v. United States Credit System, 165 Mass. 501, 43 N.E. 293 (1896); General Bonding & Casualty Ins. Co. v. Waples Lbr. Co., 176 S.W. 651 (Tex. Civ. App. 1915); Lonergan v. San Antonio Trust Co., 101 Tex. 63, 104 S.W. 1061 (1907); Shakman v. United States Credit Co., 92 Wis. 366, 66 N.W. 528 (1896); Arnold, *The Compensated Surety* (1926) 64 U. OF PA. L. REV. 171; Note (1915) 13 MICH. L. REV. 245.

[33]Blanchard v. Blanchard, 201 N. Y. 134, 94 N.E. 630 (1911); Hill v. King, 48 Ohio St. 75, 26 N.E. 988 (1891); Loy, *The Surety* (1918) 66 U. OF PA. L. REV. 40, 59-62.

[34]"From the creditor's standpoint, the surety and his principal equally owe the debt of all of it. The surety if solvent may ordinarily be forced at once to pay, and must seek reimbursement thereafter from his principal, the law aiding him by a subrogation to all the liens held by the creditor. . . . equity will itself go far to exonerate a solvent surety and to prevent his property being sold by compelling the principal to pay and by subjecting first the principal's property, especially that put up as security for a debt." Pinckney v. Wiley, 86 F.(2d) 541, 543 (C.C.A. 5th, 1936).

[35]Fidelity & Deposit Co. v. Deposit Guaranty Bank & Trust Co., 164 Miss. 286, 144 So. 700 (1933); Greenberg v. Leff, 104 N. J. Eq. 502, 149 Atl. 196 (1930).

There are recognized limitations to the exercise of the right of exoneration. The equitable rights of the surety will be protected only where protection can be given without prejudice to the substantial rights of the creditor. Equitable relief will be granted only with due regard to the interests of the creditor. He will not be subjected to the risk of loss, nor will he be subjected to unreasonable delay in collecting the debt.[36]

All parties having any interest in the subject matter of the bill and all parties sought to be bound by the decrees asked for should be parties to the bill.[37] This is a right for a surety and by a surety, and it therefore follows that the surety must be plaintiff in the action. The obligee, the principal, the creditors, third party claimants, and the indemnitors, if there are any, should be made parties defendant.[38] The surety is necessarily plaintiff because it seeks to be relieved of the burden of meeting the principal's obligation. The obligee is made a party so that the amount due by the principal can be determined and payment decreed. The principal is made a party so that he may be bound by the relief granted, whether it be garnishment, a mandatory injunction directing payment to the surety by the obligee, a decree for specific performance of the principal's contract to pay the creditors the amount due them,[39] or the appointment of a receiver to receive the principal's assets and disburse them in accordance with the decree. The creditors are made parties so that the amounts due them by the principal can be determined and the payments due them be decreed and received by them.[40] Third parties claiming an interest in any fund due the principal are made parties so that their interests in the fund can be determined. The indemnitor or indemnitors are made parties so that their obligations can be determined and payment by them decreed.[41] Where the obligee is a sovereign body it cannot be made a party (unless such action

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[36]"When protection can be afforded a surety without substantial injury to the creditor, a court of equity may afford that relief without the debt being paid by the surety. . . . [R]elief of this nature should only be awarded with due regard to the interests of the creditor; the creditor should not be subjected to the danger of loss, or even unreasonable delay in collecting his debt; indemnity against loss may be required; the special circumstances of the case may control the relief." Greenberg v. Leff, 104 N. J. Eq. 502, 146 Atl. 196, 197 (1930). See also Stulz-Sickles Co. v. Fredburn Construction Co., 114 N. J. Eq. 475, 169 Atl. 27 (1933); Philadelphia R.R. v. Little, 41 N. J. Eq. 519, 7 Atl. 356 (1886); 21 R.C.L. 1110, § 146.

[37]Hutchinson Wholesale Co. v. Brand, 79 Kan. 340, 99 Pac. 592 (1909); Hurm v. Collingan, 202 Ky. 807, 261 S.W. 602 (1924); McDaniel v. Austin, 32 S. C. 601, 11 S.E. 350 (1890); ARANT, SURETYSHIP (1931) 320, 321.

[38]Hutchinson Wholesale Co. v. Brand, 79 Kan. 340, 99 Pac. 592 (1909); Vian v. Hilberg, 111 Neb. 232, 196 N.W. 153 (1923); Croone v. Bivens, 2 Head 339 (Tenn. 1859).

[39]2 STORY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1011.

[40]2 HARE & WALLACE, AMERICAN LEADING CASES 412.

[41]Hayden v. Thrasher, 18 Fla. 792 (1882).

is specifically authorized by statute),[42] and the only real protection in such cases would be the appointment of a receiver;[43] because if the decree only directed the principal to make payment to the creditors, and he failed, then the surety would lose the funds, which contempt proceedings would not restore.

From the surety's standpoint, one objectionable feature to the exercise of this right is that all creditors must be made parties defendant. To make them defendants is necessary in order that the amount due by the principal to the creditors can be determined so that the principal cannot at any later time dispute such indebtedness, and further, in order that the creditors can receive payment. Often the creditors are many, and each must be made a party and his account separately determined. The proceedings sometimes become burdensome and expensive; but, again, this is a safe procedure and the flexibility and elasticity of the remedy and the benefits secured in most instances overcome the cumbersomeness of the procedure and the expenses incident thereto.

Contribution and subrogation differ from exoneration. Like exoneration, these are equitable remedies that may be enforced by a bill in equity, and the allegations and the prayers in such bills distinguish the nature of the bill. Exoneration exists between those successively liable, while contribution[44] exists between those equally liable,[45] and subrogation springs naturally out of exoneration and contribution and is, in fact, one of the means by which those equities are enforced.[46] The main difference is that in both the rights of contribution and subrogation the surety must pay before it is entitled to the right; whereas the right of exoneration forces payment by the principal before recourse to the surety is necessary. Contri-

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[42]In Admiral Oriental Line v. United States, 86 F.(2d) 201, 204 (C.C.A. 2d, 1936) it was said that if a bill against the United States under the Tucker Act "sound in contract, and call only for the payment of money, relief may be granted, although only a court of equity would give it."

[43]Southwestern Surety Ins. Co. v. Wells, 217 F. 294 (E. D. Pa. 1914).

[44]Banker's Surety Co. v. Wyman, 141 Iowa 574, 120 N.W. 116 (1909); Broderick v. Lucas' Ex'r 182 S.W. 154 (Mo. App. 1916); 13 Am. Jur. 4, § 1 *et seq.*

[45]Bispham, Principles of Equity (10th ed. 1922) 536, 537.

[46]United States v. Nat. Surety Co., 254 U. S. 73, 41 Sup. Ct. 29, 65 L. ed. 143 (1920), (1922) 70 U. of Pa. L. Rev. 245; Maryland Casualty Co. v. Fouts, 11 F.(2d) 71, 46 A.L.R. 852 (C.C.A. 4th, 1926); Maryland Casualty Co. v. United States, 32 F. Supp. 746 (Ct. Cl. 1940); Dowdy v. Blake, 15 Ark. 205, 6 S.W. 897 (1887); Bispham, Principles of Equity, (10th ed. 1922) 421. See also Southwestern Surety Ins. Co. v. Wells, 217 Fed. 294, 295 (E. D. Pa. 1914), where the court said: "To require the surety to pay, in order that the principal might be required to pay, is a circumlocution and superfluous. The direct road to the same objective is to require the principal to pay. This is common sense, right, and equity."

bution[47] and subrogation[48] are enforceable at law as well as in equity, but exoneration is enforceable only in equity.[49]

The adoption of the new Rules of Civil Procedure means that for the district courts of the United States the distinction between legal and equitable forms of action has been abolished, and one form of civil action and procedure for both cases in equity and actions at law has been provided. In considering what effect the adoption of these rules may have upon the rights of exoneration, it is necessary only to consider the situation which exists in the states which have abolished distinctions between law and equity forms of action. In Bispham's *Principles of Equity*,[50] the author in referring to the situation in such states makes the following comment:

> "But even in those states where this sweeping change has been effected, it has still been found necessary to make provisions for certain equitable remedies, the absence of which would inevitably result in failure of justice in many cases. Thus, injunctions and writs of *ne exeat* are issued, specific performance is enforced, and receivers appointed upon application not made according to the course and practice of chancery, but under common law or statutory forms; and relief which falls under the *quia timet* jurisdiction of equity is afforded through the medium of a petition or complaint."

The new Rules just referred to seem to be sufficiently comprehensive to enable the court to grant full relief just as effectively and probably more effectively than was possible prior to their adoption.[51]

The decision of the Supreme Court of the United States in the case of *Erie Railroad v. Tompkins*[52] does not substantially affect the right of exoneration. Both the state and federal courts have granted this relief, and whether the state law or the federal law is applied, the remedy is substantially the same.

The hypothetical case given in the beginning of this paper presents a situation where little doubt exists as to the right of the surety to exonera-

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[47] Bushnell v. Bushnell, 77 Wis. 435, 46 N.W. 442 (1890); 50 C. J. 286, § 478.

[48] 50 C. J. 265, § 438.

[49] Street v. Chicago Wharfing & Storage Co., 157 Ill. 605, 41 N.E. 1108 (1895); Neal v. Buffington, 42 W. Va. 327, 26 S.E. 172 (1896); CLARK, PRINCIPLES OF EQUITY (1937) § 453.

[50] (10th ed. 1922) 26, 27.

[51] See Twist v. Prairie Oil & Gas Co., 274 U. S. 684, 47 Sup. Ct. 755 71 L. ed. 1297 (1926); Liberty Oil Co. v. Condon Nat. Bank, 260 U. S. 235, 43 Sup. Ct. 118, 67 L. ed. 232 (1922).

[52] 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1937). See Miller, *Swift v. Tyson and Some Considerations of Philosophy in American Law* (1939) 11 MISSISSIPPI LAW JOURNAL 243.

tion. The following hypothetical case differs from the first in that it presents a situation where there is difference of opinion among counsel.

A surety has written a statutory performance bond and a separate statutory labor and material bond running to a municipality. The statute gives no lien to laborers and materialmen on the contract price in the hands of the municipality. There is no trust fund statute. The contract contains no provision requiring the contractor to pay for labor and material, but merely obligates the contractor to furnish labor and material. There is no provision in the contract requiring a retention of any part of the contract price until payment of the labor and material bills. There is a provision in the contract invalidating assignments of the contract. The surety has taken an application from the contractor providing that upon default of the contractor either in the performance of the contract or in payment of labor and material bills, the remaining contract price is thereupon assigned to the surety, the assignment to become effective as of the date of the application. The contractor has completed the contract to the satisfaction of the municipality. The surety has received demands from unpaid materialmen who have claims totaling more than the amount of the unpaid portion of the contract price, and has requested the municipality to withhold payment of the remaining contract price because of the outstanding bills. In doing so, the surety relied upon the assignment which had been incorporated in the application and upon the equitable lien of the surety. The municipality has taken the position that the assignment in the application is ineffective by reason of the contract provision invalidating assignments and has declined to recognize any equitable lien of the surety and has refused to recognize any obligation on the part of the municipality to see to it that the contract price is paid to the materialmen. The municipality has informed the surety that it expects to pay the money to the contractor. The surety fears that the contractor is insolvent, although the contractor insists that he is solvent and promises to take care of his obligations. The surety fears that the contractor will pay the money when collected from the municipality to a bank holding an assignment of the contract price, or that the contractor will otherwise place the funds beyond the reach of the surety. What remedy is available to the surety?

In answering this question it is necessary to bear in mind that exoneration creates no new obligations, but enforces existing obligations.[53] In the case presented, the city has no legal obligation to see to it that laborers and materialmen are paid. Laborers and materialmen may have

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[53]West Huntersville Cotton Mills Co. v. Alter, 164 Ala. 305, 51 So. 338 (1910).

no claim against the city and no lien on the contract price, legal or equitable,[54] since the contract does not require the contractor to pay for labor and material. The city is obliged to pay the contractor the balance due regardless of the fact and extent of unpaid bills. By reason of the provision in the contract against assignments, so long as the contract price remains in the hands of the city, the surety's assignment incorporated in the application is inoperative. Once, however, the fund passes from the hands of the city, the assignment is good in the absence of intervening equities, as, regardless of the provision in the contract against assignments, it is good between the parties to the assignment. The assignment to the surety was executed first in point of time, but was inoperative until after the assignment to the bank. By its terms its effectiveness related back to the date of execution. While the better view seems to be that the surety's assignment has preference over that of the bank,[55] the law of the state governs, whether the action be in the federal or state court. Many decisions hold that a surety has an equitable lien[56] upon the contract price independently of assignment,[57] while other decisions hold that the equitable lien arises out of the assignment.[58] The surety in the case stated should be entitled to a decree requiring its principal to pay[59] the fund to laborers and materialmen to whom the surety is liable and is entitled to the protection of a receiver appointed to collect and distribute the money to insure enforcement of the decree.[60] It is not intended that this conclusion be universally applicable. It is necessary to look to the law of the state. Some jurisdictions may under the facts presented grant different relief or relief on a different theory, and in other jurisdictions no relief may be possible.

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[54]Martin v. National Surety Co., 300 U. S. 588, 57 Sup. Ct. 668, 81 L. ed. 822 (1936); American Surety Co. v. Westinghouse Electric Mfg. Co., 296 U. S. 133, 56 Sup. Ct. 9, 80 L. ed. 105 (1935); U. S. F. & G. v. Sweeney, 80 F.(2d) 235 (C.C.A. 8th, 1935); *In re* Gilmore, 28 F. Supp. 1010 (S. D. Ohio 1933).

[55]Martin v. Nat. Surety Co., 300 U. S. 588, 57 Sup. Ct. 668, 81 L. ed. 822 (1936).

[56]By the great weight of authority, a surety paying labor and material bills under compulsion of its bond has a prior right to the contract price to that of an assignee bank, a volunteer. See Henningsen v. U. S. F. & G., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. ed. 547 (1907).

[57]American Surety Co. v. Westinghouse Electric Mfg. Co. 296 U. S. 133, 56 Sup. Ct. 9, 80 L. ed. 105 (1935); Belknap Hardware & Mfg. Co. v. Ohio River Contract Co., 271 Fed. 144 (C.C.A. 6th, 1921); United States v. Rundle, 100 Fed. 400 (C.C.A. 9th, 1900).

[58]National Surety Corp. v. Massachusetts Bonding & Ins. Co., 134 S.W.(2d) 611 (Ky. 1912).

[59]A surety upon payment is entitled to subrogation to the rights of its principal. *In re* Scofield, 215 Fed. 45 (C.C.A. 2d, 1914).

[60]Central Surety & Ins. Co. v. Bagley, 44 F.(2d) 808 (S. D. Cal. 1930); Southwestern Surety Ins. Co. v. Wells, 217 Fed. 294 (E. D. Pa. 1914).

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STATE BAR SECTION

PROGRAM

for the

THIRTY-SIXTH ANNUAL MEETING OF THE MISSISSIPPI STATE BAR
to be held at
HOTEL MARKHAM, GULFPORT, MISSISSIPPI, JUNE 25-27, 1941

Wednesday, June 25

11:00 A.M. Executive Committee Meeting, Junior Bar Section

2:00 P.M. Annual Meeting of the Junior Bar Section,
George M. Ethridge, Jr., Meridian, Chairman

Reports of Committees:
(1) Admissions to the Bar, Charles A. Sisson, Clarksdale, Chairman
(2) Bureau of Identification, Investigation and Statistics, Howard A. McDonnell, Biloxi, Chairman
(3) Legislative Drafting, J. M. Stevens, Jr., Jackson, Chairman
(4) Legislative Committee, Maxwell Bramlette, Woodville, Chairman
(5) Pleading, Practice and Procedure, Junior O'Mara, McComb, Chairman
(6) Cooperation with Young Lawyers, Hugh N. Clayton, New Albany, Chairman
(7) Public Relations, George R. Neblett, Shelby, Chairman
(8) Code Committee, John W. Wade, University, Chairman

4:30 P.M. "The Present Duty of the Lawyer," Hon. Sam M. Johnston, Mobile, Alabama, President, Alabama State Bar

7:30 P.M. Completion of Committee Reports

8:00 P.M. "The FBI and National Defense," Hon. Hugh N. Clegg, Assistant Director Federal Bureau of Investigation, U. S. Department of Justice, Washington, D. C.
Election of Officers
Adjournment

10:00 P.M. Dance (Broadwater Beach)

Note: 2:30 P.M. Meeting of all State Judges (Federal, Supreme Court, Circuit, Chancery and County)

Thursday, June 26

10:00 A.M. Call to Order, Wm. E. Morse, Jackson, President
Invocation
Welcome Address on Behalf of City of Gulfport, Mayor J. W. Milner, Gulfport
Welcome Address on Behalf of Harrison County Bar
Response to Welcome Addresses, Elbert Johnson, Indianola, Vice-President, Mississippi State Bar

10:45 A.M. President's Address

11:30 A.M. "The Old Order Changes," Hon. Arthur Mareno, New Orleans, Past President, Louisiana Bar

12:30 P.M. University of Mississippi Law School Alumni Luncheon (Crystal Ballroom)

2:00 P.M. Committee Reports

3:00 P.M. "The Wage and Hour Law," Robert Amis, Birmingham, Alabama, Representative of the Department of Labor

3:45 P.M. Pilgrimage to Beauvoir

8:00 P.M. Annual Banquet (Markham Roof), Judge G. Garland Lyell, Jackson, Toastmaster
Speakers: Forrest G. Cooper, Indianola
James D. Arrington, Collins

10:00 P.M. Dance (Markham Roof)

Friday, June 27

8:00 A.M. Past President's Breakfast (Markham Screened Terrace)

9:00 A.M. Report of the Junior Bar Section, George M. Ethridge, Jr., Meridian, Chairman

10:30 A.M. "The Law School in Action," Chancellor A. B. Butts, University, Mississippi

11:00 A.M. Principal Address, Dean James M. Landis, Harvard Law School, Cambridge, Massachusetts

2:00 P.M. Election of Officers
Selection of Next Place of Meeting
Introduction of New Officers
Adjournment

3:45 P.M. Boat ride to Fort Massachusetts

Report of Code Committee of Junior Bar Section

The Legislature not having met since the last meeting of the Junior Bar Section, this committee has nothing to report on past recommendations which have been adopted by the Junior Bar Section. It is understood by this committee that all of these recommendations are carried forward and will be presented to the Legislature by the Legislative Committee at the appropriate time.

The committee has the following specific recommendations to make:

I

At the present time, the Code makes no provision for annulment of marriages. Section 1414 lists indiscriminately as causes for divorce grounds for annulment and grounds for divorce. This confusion creates many serious difficulties, and the committee recommends the repeal of this section and the enactment of the following three sections:

1. All bigamous, incestuous or miscegenatious marriages are void without the necessity of a decree, but a decree of nullity may be obtained at the suit of either party.

2. In the absence of ratification, a marriage may be annulled for any one of the following causes existing at the time of the marriage ceremony:

(a) Incurable impotency.

(b) Insanity of either or both parties. Action in behalf of an insane spouse may be brought by guardian, or in case the spouse has died before there is a reasonable time for appointment of a guardian and bringing of suit, by any relative who would have inherited had the spouse been single provided suit be brought within six months after the death.

(c) Non-age (less than 17 years for the male and less than 15 years for the female) of the party bringing suit. Suit must be brought for this cause within one year after the date of the marriage.

(d) Failure to comply with the five-day period of delay as required by Section 2363. Suit for this cause may be brought at any time within one month after the marriage, but not thereafter.

(e) Fraud or duress imposed upon the party bringing suit.

(f) Pregnancy of the wife by another person.

(g) Lack of contractural consent due to mistake, drunkenness or other similar cause.

3. Divorce from the bonds of matrimony may be decreed to the injured party for any of the following causes:

(a) Adultery.

(b) Being sentenced to any penitentiary and not pardoned before being sent there.

(c) Willful, continued and obstinate desertion for the space of one year.

(d) Habitual drunkenness.

(e) Habitual and excessive use of opium, morphine, or other like drug.

(f) Habitual cruel and inhuman treatment.

(g) Incurable insanity. But no divorce shall be granted upon this ground unless the insane party shall have been under regular treatment for insanity and causes thereof, confined in an institution for the insane for a period of at least three years immediately preceding the commencement of action. No divorce shall be granted because of insanity until after a thorough examination of such insane person by three physicians who are recognized authorities on mental diseases, one of which physicians shall be a superintendent of a State *or federal* hospital for the insane, and the other two physicians to be appointed by the court before whom the action is pending, all of whom shall agree that such insane person is incurable; provided, further, that in granting a divorce upon this ground, notice of the pendency of the action shall be served in such manner as the court may direct, upon the nearest blood relative and guardian of such insane person, and the superintendent of the institution in which he is confined. Such relative or guardian and superintendent of the institution shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of the insane person shall not be altered in any way by the granting of the divorce.

However, a decree of divorce on the ground of incurable insanity, shall not abridge or affect the right of the insane person to inherit, and before any such decree is granted, the complainant shall enter into bond to be approved by the court, in such an amount as the court may think just and proper, conditioned for the care and keeping of such insane person during the remainder of his or her natural life, unless such insane person has a sufficient estate in his or her own right for such purpose.

A study of Section 1414 in its amended form as it appears in the 1938 Supplement will show that there are comparatively few changes except in the separation of the causes into three group. In Section 2 (on annulment), there are added one or two grounds for which annulment might be granted at common law. Principal changes are in subsections (b), (c), (d), (e) and (g). In Section 3 (g), a slight change has been made by the addition of the two words in italics.

Further changes in the code chapter on Divorce (largely required by the separate provision for decrees of annulment), are recommended as follows:

For the first sentence in Section 1422, there should be substituted the following, which should be enacted as a separate section:

> 4. The issue of a void marriage or a marriage which has been annulled or dissolved by a decree of divorce is legitimate, whether the marriage be declared void because of a prior existing marriage or not. The issue of a miscegenatious marriage is expressly excepted from this section.

The rest of Section 1422 (dealing with an order prohibiting an adulterer from remarrying), would remain in the section in substantially its present form.

Corresponding to Section 1421, dealing with custody of children and alimony in cases of divorce, the following two sections should be enacted for cases of annulment:

> 5. When an annulment shall be decreed or a marriage declared void, the chancery court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just make all orders touching the care, custody and maintenance of the children of the marriage; and the court may, afterwards, on petition, change the decree and make from time to time such new decree as the case may require.
>
> 6. When an annulment shall be decreed, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the maintenance and alimony of the wife, or any allowance to be made to her, and may, if need be, require sureties for the payment of the sum so allowed; and the court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require.

Section 1420 should be amended so as to apply also to annulment proceedings, and would then read:

> 1420. The proceedings to obtain a divorce *or an annulment* shall not be heard or considered nor a decree of divorce *or annulment* entered except in open court. . . . "

The words in italics are added. The rest of the section would not be changed.

A detailed treatment of the need for the changes in the present statute and of the reasons for these particular changes will be found in a Note in 12 *Mississippi Law Journal* 464 (May, 1940). No attempt will here be made to repeat the discussion which will be found in this Note.

II

The Mississippi statutes fail to make any provision for cases where a ward dies during the course of a guardianship proceeding. Naturally the guardianship terminates at such time, and normally the estate of the deceased ward would then be administered, with the guardian turning the assets of the estate over to the administrator. It is thought, however, that there is a need for special provisions to cover the peculiar situation which exists in case of death of the ward under guardianship.

It has been the policy of our laws to make special provision for small estates. This is indicated by Code Sections 1751-53 (covering wages in amounts less than $300 due decedent at time of his death), and Code Section 1670 (dispensing with newspaper publication of notice to creditors in estates under $500); and a similar policy has been manifested in guardianship proceedings by Code Section 1892, as amended by chapter 54 of the Acts of the Extraordinary Session of 1938, which provides that a guardianship may be terminated when the assets are less than $300 with no prospect of further income. Separate provision for small estates is wise, to keep them from being dissipated by administrative costs. This is particularly true in connection with the estate of a deceased ward, since there will already have been an inventory, and probably notice to creditors, payment of outstanding debts and regular accountings, and the affairs of the estate are all in order and in the hands of a bonded and reliable individual.

The committee therefore recommends the enactment of the following section:

> 1. On the death of the ward a guardianship shall terminate; and if the assets of the guardianship estate at that time amount to less than $300, administration of the estate shall not be necessary, and the court may order the guardian to distribute the assets directly to the heirs in the proportions provided by statute or by the ward's will.

The committee feels that in the case of estates larger than $300 the regular administration procedure should be retained. However, it is felt that on the death of the ward the guardian is really a party "interested" in his estate; that all the affairs of the estate are then in the guardian's hands, and that he is the person best acquainted with the estate and best able to handle it; and that often the ends of justice and the best interests of the estate would be better served if the guardian were able to apply for and secure letters of administration upon the estate. It is felt that the guardian should be given such standing under law as would enable him to make application for letters of administration upon an equal footing with the most favored other person, but that the rights of heirs and other interested parties to act as administrator should not be defeated or diminished.

The committee therefore recommends the enactment of a second section to read:

> 2. When a ward, while under guardianship, dies either intestate or testate but without naming an executor, the guardian may, if the estate is subject to administration in the county where the guardianship was instituted, apply for letters of administration or appointment as executor in such county. If any other person who is entitled to apply for letters of administration, or appointment as executor, shall make such application or contest the guardian's application, then it shall be in the discretion of the court to determine and make such order and appointment as will best serve and protect the interests of the estate.

III

Section 64 of the Code, concerning appeals from a justice of the peace court in civil cases, sets a time limit of 10 days. Section 68, providing for appeals in criminal cases, contains no time limit at all. The committee feels that there should be some limit of time during which the appeal might be taken. It first considered recommending a 10-day period as in civil cases but finally decided that there were valid reasons for a longer period of time in criminal cases. Six months was the time finally agreed upon. It is therefore recommended that Section 68 of the Code be amended so as to read as follows:

> 68. APPEALS IN CRIMINAL CASES—BOND ON APPEAL, LIQUOR LAW VIOLATIONS. In all cases of conviction of a criminal offense against the laws of the state by the judgment of a justice of the peace, or by the mayor or police justice of a city, town or village, for the violation of an ordinance thereof, an appeal may be taken to the circuit court of the county which shall stay the judgment appealed from, *such appeal to be perfected within six months of the rendition of the judgment of conviction appealed from;* and the appellant if sentenced to imprisonment for an offense or to stand committed until his fine and costs shall be paid. . . . "

The rest of the section will remain unchanged. The new matter is in italics.

IV

Section 3348 of the Code is the special Statute of Frauds for trusts. It provides that a declaration of trust shall be "utterly void" if it is not in writing; and then adds that it must be acknowledged and recorded and that it "shall only take effect from the time it is so lodged for record." The Supreme Court has construed this second provision to mean that if a trust instrument is not propertly acknowledged and lodged for record, it can have no effect even between the immediate parties. *Board of Trustees M. E. Church South v. Odom,* 100 Miss. 64, 56 So. 314 (1911). A similar provision in Oklahoma was held inapplicable to the immediate parties [*Kimberly v. Cissna,* 161 Okla. 17, 16 P. (2d) 1090 (1932)]; and there is at least one case in Mississippi in which the requirement of this section was not considered [*Morgan v. Haywood,* 115 Miss. 354, 76 So. 262 (1917)]. In order to be effective against third parties a trust instrument should be properly recorded, but as to the immediate parties to the instrument it would appear that the writing is sufficient and that the recording serves no significant purpose. It seems very likely that the section was awkwardly phrased in an attempt to reach the result attained by the regular recording statutes (Secs. 2146-48). The doctrine of the *Odom* case is unfortunate in application to ordinary declarations of trust; it would be far more so if applied to deeds of trust given for security purposes, as may possibly be done. The committee therefore recommends that Section 3348 be amended to make it conform to the provisions of the recording statutes and to read as follows:

3348. TRUSTS AND CONFIDENCE. Hereafter all declarations or creations of trusts or confidence of or in any land shall be made and manifested by writing, signed by the party who declares or creates such trust, or by his last will, in writing, or else they shall be utterly void; and every writing declaring or creating a trust shall take effect as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors, only from the time it is acknowledged or proved as other writings, and lodged with the clerk of the chancery court of the proper county to be recorded; but where any trust shall arise or result, by implication of law, out of a conveyance of land, such trust or confidence shall be of the like force and effect the same as it would have been if this statute had not been passed.

Section 3349, dealing with assignment of trusts requires the same amendments. In addition, this section does not provide that it applies only to land, though it obviously was passed as a part of the same act as Section 3348 and was intended to have the same application. It is therefore recommended that Section 3349 be amended to read as follows:

3349. ASSIGNMENT OF TRUSTS. All grants, assignments, or transfers of any trust or confidence of or in any land shall likewise be in writing, signed by the party granting or assigning the same, or by last will and testament, or else they shall likewise be utterly void; and such grant or assignment shall take effect as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors, only from the time it is lodged with the clerk for record.

V

Section 3551 of the Code provides for express revocation of wills, and then it and Section 3552 make provision for children born after the making of a will and therefore pretermitted. Distinctions are drawn between cases where there were already some children born at the time of the making of the will and cases where there were none at the time, and between children born after the making of the will but before the death of the testator and posthumous children. The provision in Section 3551 for children born after the making of the will when there were no children at the time the will was made, is so confusing that it is impossible to determine with any degree of certainty the condition of the title during the period between the death of the testator and the time when the child reaches the age of 21 or marries. No reason is seen for the making of all of these distinctions, and the confusing provisions can easily be simplified. The committee therefore recommends that Section 3551 be amended so as to provide only for express revocations and that Section 3552 be amended so as to provide a uniform rule for all children born after the making of a will. As so amended, the sections would read as follows:

3551. REVOCATIONS. A devise so made, or any clause thereof, shall not be revocable but by the testator or testatrix destroying, canceling, or obliterating the same, or causing it to be done in his or her presence, or by subsequent will, codicil, or declaration, in writing, made and executed.

3552. CHILDREN BORN AFTER MAKING OF THE WILL. If a child is born to a testator or testatrix after the execution of the last will and testament of the testator or testatrix, either during the lifetime or after the death of the testator or testatrix, and the child is neither provided for by settlement nor provided for or mentioned in any way in such will, the child shall succeed to the same share of such parent's real and personal estate to which the child would have been entitled if the parent had died intestate, and shall be entitled to recover such share from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by the will.

VI

The committee recommends the enactment of the following two sections on adoptions:

1. Whenever a person has been, or is hereafter legally adopted, with full right of inheritance from his or her adoptive parent or parents, the adopted person's property, at death, shall descend as if the adopted person were the blood child of the adoptive parent or parents.

2. Whenever a person has been, or is hereafter legally adopted under the laws of any other state, the District of Columbia, or possessions of the United States, and given the full right of inheritance under such adoption proceeding, that person shall be entitled to inherit both real and personal property in the State of Mississippi as fully as if the adoption had taken place in the State of Mississippi.

VII

It sometimes happens that a judgment affecting the titles to certain property is enrolled on the same day an examination of the title to that property is made by an attorney, and if the examination is made prior to the enrolling of the judgment, the attorney's certificate will not disclose the lien of the judgment. The question will then arise as to whether the attorney missed the judgment. The records should affirmatively show whether the judgment was on the roll at the hour and minute the attorney's certificate is dated. The committee therefore recommends that Section 610 of the Code be amended so that the fifth column in the caption required for the judgment roll will read: "Date, Hour and Minute of Enrollment." It also recommends that the second sentence of this section be amended so as to read:

"And the clerk shall, within twenty days after the adjournment of each term of the court, enroll all final judgments rendered at said term, in the order in which they were entered on the minutes, by entering on the judgment roll, under the proper letter or letters of the alphabet, the names of each and every defendant to said judgment, the amount of such judgment, the date, *hour and minute* of its rendition, the county and the court in which rendered, the date of enrollment, and the names of the plaintiff or plaintiffs."

The words in italics are added.

VIII

Last year's committee suggested that the committee this year give consideration to a statute allowing contribution between joint tort-feasors. The committee has considered this topic at some length and while it believes that a statute should be enacted for this purpose it has been unable to agree on the exact provisions of this statute. The committee therefore suggests that this subject be again considered next year and that a further attempt be made to draft a satisfactory statute.

There are several other topics considered by the committee on which it does not now desire to make recommendations. Some of these will be presented to next year's committee for further consideration by it.

The committee concludes with the recommendation that it be continued with a new personnel.

Respectfully submitted,
JOHN W. WADE, *Chairman*

NOTICE

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NOTES AND COMMENTS

The 1934 Tax-Title Statute and the Case of Russell Investment Corporation *v.* Russell

Previous to 1934 the period of limitation within which tax-titles might be contested in Mississippi was determined under a single statute. Actual occupation for three years, after a two-year redemption period, barred any suit of the former owner to recover the land or assail the title because of a defect in the tax sale or procedure preparatory to sale.[1] A special statute, restricted in its application to favor only the State of Mississippi and its patentees, was enacted on April 4, 1934, limiting the period after a tax sale within which an action might be brought to cancel the tax-title or to recover the property.[2] As to lands sold to the state or its patentees at any time since January 1, 1928, but before the date of enactment of the statute, the limitation was prescribed to begin two years after the act became effective. A two-year redemption period was provided in case of sales made after the statute had become effective, and contests were barred as to these tax-titles after two years following the redemption period.[3] Clearly then, the statute was intended to have a retrospective as well as a prospective application.[4] The first section of the act provides for the limitation periods; and, thought not requiring actual adverse occupancy, would seem to set up a statute of limitations substantially similar to the existing

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[1]Miss. Code Ann. (1930) § 2288.

[2]Miss. Code Ann. (Supp. 1938) § 141 (Miss. Laws 1934, c. 196).

The statute reads as follows:

"1. The owner, mortgagee or other person interested in any land which has been heretofore sold or forfeited to the State for delinquent taxes may bring a suit or action to cancel the title of the State, or its patentees, or to recover said land from the State, or its patentees, on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes, within two years after the date this Act becomes effective as to lands heretofore sold or forfeited to the State for delinquent taxes, and within two years after the period of redemption shall have expired, as to lands hereafter sold or forfeited to the State for delinquent taxes, and not thereafter. Provided, however, the limitations herein fixed shall not apply when the taxes on such land had been paid prior to the time it was sold for taxes, and provided, further, that the provisions of this Act shall not apply to lands sold to the State prior to January 1, 1928.

"2. If any person entitled to bring any action mentioned in Section 1 hereof shall, at the time at which the cause of action accures, be under the disability of infancy, or unsoundness of mind, he may bring the action within the time in this Act respectively limited after his disability shall be removed but the saving of persons under disability shall never extend longer than twenty-one years.

"3. The completion of the limitation herein prescribed to bar any action shall defeat and extinguish all the right, title, and interest, including the right of possession in and to such land, of any and all persons whatsoever, except the State of Mississippi and its patentees, and it shall vest in the State, and its patentees, a fee simple title to such lands."

[3]The Mississippi Constitution provides that there shall be at least a two-year redemption period in cases of tax sales. Miss. Const. § 79.

[4]For a discussion of the legislative intention, particularly from the standpoint of prospective and retrospective operation, see Russell Investment Corp. v. Russell, 182 Miss. 385, 178 So. 815 (1938).

law.[5] But in its final clause the operation of the statute is said to "defeat and extinguish all the right, title and interest, including the right of possession in and to such land" of all except the State and its patentees. The operation of this section would seem to be curative in its nature.[6] Thus the statute appears intended to operate not only retrospectively as well as prospectively, but also in the nature of a curative act as well as a statute of limitations.

The Retrospective Aspect

The court has rendered opinions in five cases which apply and construe the statute.[7] All the cases apply to titles arising under tax sales made prior to the passage of the act. Before the decision in *Russell Investment Corp. v. Russell*,[8] the first of these cases, the law of Mississippi as to similar statutes applied retrospectively was governed by the case of

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[5]As to whether or not a statute of limitation may run in favor of one not actually in adverse possession, see note 32 *infra*.

[6]In the recent case of Lee v. Smith, 198 So. 296, 298 (Miss. 1940) Judge Smith said: "Section 3 of Chapter 196, Laws 1934, however, is more than a mere statute limiting the time within which to bring an action to cancel the title of the state to land sold it for taxes . . . ; for, on the expiration of the time limit in Section 1 of the chapter, it 'extinguish[es] all the right . . . in and to such land, of any and all persons whatsoever' . . . ."

At this point, it is important to distinguish clearly between a statute of limitations and a curative act. "Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. . . . Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time." 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 761. A statute of limitation merely sets a reasonable limit upon the time within which a right of action must be taken.

A curative act, on the other hand, attempts to heal the irregularity which gives rise to the cause of action. "Their purpose is usually either the validation of transactions tainted with invalidity for failure to comply with the formal requirements of their validity, or to confer rights that have been lost through failure to meet the conditions to their assertion." ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) § 253. There need be no reasonable time allowed for the bringing of an action, as under a statute of limitation, before the defect upon which it arises is healed. In fact, a curative statute may be prospective in its operation, thus healing the defects as they occur. See 4 COOLEY, TAXATION (4th ed. 1924) §§ 1586, 1591.

[7]Lee v. Smith, 198 So. 296 (Miss. 1940) [sale void for non-compliance with Miss. Laws Ex. Sess. 1932, c. 383, § 9: MISS. CODE ANN. (1930) § 3249]; Bruce v. Smallwood, 188 Miss. 771, 196 So. 229 (1940) (sale void for non-compliance with MISS. LAWS EX. SESS. 1932, c. 383, § 9), discussed in Daniel, *Work of the Mississippi Supreme Court—Taxation* (1940) 13 MISSISSIPPI LAW JOURNAL 74, 77; Jones v. Russell, 187 Miss. 827, 194 So. 290 (1940) (sale made on last day on which taxes could be paid) discussed in Daniel, *supra*, at 76; White v. Noblin, 183 Miss. 92, 183 So. 914 (1938) [void for non-compliance with MISS. CODE ANN. (1930) § 3249] Russell Investment Corp. v. Russell, 182 Miss. 385, 178 So. 815 (1938) *sugg. err. overr.*, 182 Miss. 385, 411, 182 So. 102 (1938) [leading case; sale void for non-compliance with MISS. CODE ANN. (1930) § 3249], discussed in Daniel, *supra*, at 77; Lowry, *Work of the Mississippi Supreme Court—Taxation* (1939) 12 MISSISSIPPI LAW JOURNAL 109; Wade, *Work of the Mississippi Supreme Court—Taxation* (1938) 11 MISSISSIPPI LAW JOURNAL 65.

[8]182 Miss. 385, 178 So. 815, 182 So. 102 (1938).

Dingey v. Paxton.[9] The construction of the statute in the *Russell* case must be considered in light of this case.

In the *Dingey* case the tax sale was admittedly void. The sale was made under the Abatement Act of 1875, but there was not sufficient evidence that the land was included within the provisions of the statute. Also the assessment under which the sale was made was void for uncertainty in description of the property. It was argued, however, that the title of the defendant had become absolute by virtue of the provisions of a statute which stated:

> "If any of the lands mentioned in this act shall not be redeemed or purchased as herein provided for, on or before the first day of January, 1878, no further time for redemption shall be allowed, and the title thereto shall be vested in the State of Mississippi, and no action in law or equity shall be maintained in any court of this State, either against the State of Mississippi, or any grantee or donee from the State of Mississippi for the recovery of such lands. . . ."[10]

The court declared the act had a two-fold operation: first, as a statute of limitations it prescribed a short period after which no suit should be brought by the owner for the recovery of the property; and secondly, as a curative statute it gave conveyances under the tax sale conclusive effect as evidence, cutting off all inquiry into the existence of irregularities or defects. Viewed in either light, the provisions were declared unconstitutional as depriving the taxpayer of property without due process of law. The limitations phase of the statute was unconstitutional in so far as it attempted to run against and divest an estate in possession.[11] As to the curative operation of this retrospective statute, the court recognized a very decided conflict among the authorities;[12] then said:

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[9]60 Miss. 1038 (1883).

[10]Miss. Laws 1876, c. 105, § 13.

[11]Judge Cooper said: "It is the expiration of time without regard to possession which is to transfer title from the owner and vest it in the State, or its vendee or donee. The power of the Legislature to prescribe within what reasonable time one having a mere right of action shall proceed is unquestionable; but there is a wide distinction between that legislation which requires one having a mere right to sue, to pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action, and then limits the time in which the suit may be brought. The mere designation of such an act as an act of limitation does not make it such, for it is in its nature more than that." Dingey v. Paxton, 60 Miss. 1038, 1054 (1883). As to whether a statute of limitation may, under any circumstances, run in favor of one not actually in adverse possession, see note 32 *infra.*

[12]There would appear no sound reason for generally condemning retrospective legislation, though this appears the trend of thought in some jurisdictions. For a critical analysis of the vague distrust in which the courts generally hold such statutes, see Smith, *Retrospective Laws and Vested Rights* (1927) 5 Tex. L. Rev. 213, (1928) 6 Tex. L. Rev. 409, also in 2 Selected Essays on Constitutional Law (1938) 266. Judge Cooley, who has often been quoted by the court in this connection, said: "The legislature may, in its wisdom, pass retrospective statutes, sometimes called curative laws, subject to certain well defined limitations upon the power, the chief of which are that it cannot pass a law which impairs the obligation of a contract

> "It is apparent that in some of the States a much broader power is conceded to the legislative department than in others. The limits of this power are at best uncertain, and we think, should only be defined as occasion shall require. It is sufficient for the present for us to say that the act under consideration, in so far as it attempts to validate a tax-title which was void under the law as it existed at the time of its enactment, is violative of our Constitution and void."[13]

Finally, the court expressly overruled, without reservation, the opinion in *Powers v. Penny*.[14]

In the *Powers* case a statute[15] was applied which provided that after five years from the date of a tax sale no testimony or evidence to impeach or invalidate the deeds should be entertained by any court of the state. The purchaser at the tax sale appears to have been defendant in an ejectment suit by the former owner. The statute was held to cure a defect in the proceedings resulting from the sheriff's failure to give bond as required by law. However, the court distinguished this defect in the proceedings from a defect jurisdictional or constitutional in its nature, and expressly held that the statute did not make the tax collector's deed conclusive evidence of title as against jurisdictional and constitutional defects. The court said:

> "There are certain constitutional prerequisites which the legislature cannot dispense with. There must be an assessment of

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nor one which divests vested rights." 4 COOLEY, TAXATION (4th ed. 1924) § 1587. In another treatise he said: "A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. . . . If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by a subsequent law." 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 773. See also BLACK, CONSTITUTIONAL LAW (4th ed. 1927) § 289; ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) § 252. It should be noted, however, that the restriction may be extended to defects other than those constitutional or jurisdictional. In ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) § 252, it is said: "It is also true that due process and similar constitutional provisions prohibit legislation retroactively curing formal defects under many circumstances." It will be seen that Mississippi appears to have added breach of "substantial statutory requirements" to the class of jurisdictional and constitutional defects which may not be cured by prospective curative legislation.

[13]Dingey v. Paxton, 60 Miss. 1038, 1057 (1883).

[14]59 Miss. 5 (1881).

[15]"Be it further enacted, that upon the expiration of five years from and after the sale of lands for the levee taxes under the provision of said acts, no testimony or evidence to impeach or invalidate the deeds therefor to said commissioner or his predecessors in office shall be entertained by any court of law or equity in this State, except in case of fraud . . ." Miss. Laws 1873, c. 4, § 5.

> the land, and a levy of taxes, and default in payment, before the power to sell can exist, and an act making a deed or list by the tax collector conclusive of these facts, and indisputable by evidence to controvert them, might justly be pronounced void.[16]

The language in which the opinion in the *Dingey* case states the problem of the case tends to be confusing, for the statement of the problem overshadows the statement of the holding. However, there is a definite holding[17] and an express overruling of the *Powers* case. The holding seems to be: first, as a statute of limitations the act could not constitutionally operate to divest an estate in possession; and second, all retrospective curative statutes are unconstitutional to validate tax sales void for any reason, whether constitutional, jurisdictional, or purely statutory.[18]

In *Russell Investment Corp v. Russell,*[19] the first decision to construe the statute of 1934, the tax sale, made on April 4, 1932, was attacked on the ground that the land was not offered in forty-acre divisions as required by statute.[20] Suit was filed in November of 1936. The defendant demurred on the ground that the cause of action was barred by the two-year "limitations" statute passed April 4, 1934. The question is very similar to that which was before the court in the *Dingey* case. It was held in the Supreme Court that the defendant's demurrer should be sustained,[21] and the plaintiff's attorneys argued on suggestion of error that the *Dingey* case had been overruled. On the suggestion of error,[22] the constitutionality of the act was upheld, and the *Dingey* case was distinguished.

Two grounds were presented for distinction: (1) a jurisdictional defect existed in the *Dingey* case, though only a defect in statutory requirements was present in the *Russell* case; and (2) in the *Russell* case the tax-purchaser was in adverse possession while in the *Dingey* case the tax-purchaser was not. Both distinctions seem to point to the final result reached in the *Russell* case: that the statute was purely one of limitation[23] and that it might not run against one in possession nor to bar a jurisdictional or constitutional defect. However, before declaring the statute to be only

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[16]Powers v. Penny, 59 Miss. 5, 11 (1881).

[17]"It is apparent that in some of the States a much broader power is conceded to the legislative department than in others. The limits of this power are at best uncertain, and we think, should only be defined as occasion shall require. It is sufficient for the present for us to say that the act under consideration, in so far as it attempts to validate a tax-title which was void under the law as it existed at the time of its enactment, is violative of our Constitution and void." Dingey v. Paxton, 60 Miss. 1038, 1057 (1883).

[18]The reasoning of the court would appear to be: No matter how minor the defect in procedure, the tax sale was void under the laws as they existed at the time of the sale. Any statute which cured a defect, no matter how minor, would then be acting to divest the title of the owner; therefore any retrospective curative act as to tax titles is unconstitutional. Judge Campbell, who wrote the opinion in Powers v. Penny, 59 Miss. 5 (1881), dissented, adhering to the views expressed in that case.

[19]182 Miss. 385, 178 So. 815, 182 So. 102 (1938).

[20]Miss. Code Ann. (1930) § 3249.

[21]182 Miss. 385, 178 So. 815 (1938).

[22]182 Miss. 385, 441, 182 So. 102 (1938).

[23]See note 45 *infra.*

one of limitation, the court discussed the retrospective action of curative statutes in Mississippi. This discussion of the retrospective curative aspect will be considered first, followed by the application of the statute as one of limitation.

In considering the possible effect of the statute as a retrospective curative act it should be noted that in the *Russell* case the court said, in support of the rule in the *Dingey* case, that it is universally held that a curative law can not retroactively cure a failure to observe "the constitutional requirements as to the assessment, levy and sale of the land for taxes."[24] The court then went on to say:

> "It is equally well settled that the legislature is vested with authority to cure by a retroactive statute the failure to observe requirement that it may have dispensed with in advance, such as those which are merely statutory."[25]

Following the general rule several authorities were cited, among which is *Powers v. Penny*,[26] which was expressly overruled by the *Dingey* case. The court next qualified the general rule as follows:

> ". . . such curative power does not exist where there has been a total departure from the method the law has specifically and plainly declared as to the manner in which the sales shall be conducted. . . ."[27]

Here several cases were cited which construe prospective rather than retrospective curative acts.[28]

It might be said that the defect in the *Powers* case, failure of the sheriff to give bond, was such a total departure from the method set out by law as to be "substantial" in the view of the *Russell* case and that thus there is no conflict between the *Russell* case and the *Dingey* case. On the other hand, the fact that the *Powers* case is cited in the opinion of the *Russell* case as authority, though expressly overruled in the *Dingey* case, might be taken to indicate the intention of the court to modify the opinion in the *Dingey* case as it applies to purely statutory proceedings which did not amount to a "total departure from the method the law has specifically and plainly declared." Under either view, the problem of what defect might

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[24]Russell Investment Corp. vs. Russell, 182 Miss. 385, 415, 182 So. 102, 105 (1938).

[25]*Ibid.* See also Vaughan v. Swayzie, 56 Miss. 705 (1879), which Cooley cites [4 COOLEY, TAXATION (4th ed. 1924) § 1590, n. 39] as authority for the statement: "The general rule has often been declared, that the legislature may validate retrospectively the proceedings which they might have authorized in advance." But see Carlisle v. Goode, 71 Miss. 453, 15 So. 119 (1893), denying retrospective action where the tax sale was made before passage of the act and citing the *Dingey* case.

[26]59 Miss. 5 (1881).

[27]Russell Investment Corp. v. Russell, 182 Miss. 385, 416, 182 So. 102, 106 (1938).

[28]Yazoo Delta Mortgage Co. v. Lumbley, 149 Miss. 864, 116 So. 95 (1928); Womack v. Central Lumber Co., 131 Miss. 201, 94 So. 2 (1922); Nelson v. Abernathy, 74 Miss. 164, 21 So. 150 (1896); Griffin v. Ellis, 63 Miss. 348; Virden v. Bowers, 55 Miss. 1 (1877).

then be curable would be a question for the court as to what statutory requirements would be "substantial" and what would not.

However, another possibility must be considered before either of the above views is adopted. In the *Dingey* case the court might well have held, without going further, that the act could not cure the jurisdictional defect in the assessment; but the court purposely and without necessity went further in its holding. Also the opinion expressly overruled the *Powers* case in which the defect had been held not be constitutional or jurisdictional. Thus in the *Russell* case the court might have overlooked the true extent of the holding in the *Dingey* case and also the fact that the *Powers* case was expressly overruled. In addition the court seems to attempt the application of a distinction between "substantial" and "non-substantial" irregularities in statutory procedure derived from cases dealing with *prospective* curative acts to a case involving a *retrospective* curative act. Thus, unless the *Russell* case is taken as modifying the *Dingey* case, either through explanation of its actual holding or through outright modification, there would appear no grounds for the application of this distinction. It may be that in the future the court will be held to have intended in the *Russell* case to follow the *Dingey* case without modification.[29]

The effect of the statute as a retrospective curative measure, then, depends upon whether the language of the *Russell* case was intended to explain or modify the *Dingey* case. If it was, the statute may run against purely procedural defects not "substantial" in their nature; if not, the statute would appear to have no retrospective curative operation.

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[29]This view is strengthened by the statement in the *Russell* case that: ". . . the reason [why curative powers do not exist in retrospective statutes where there has been a "total departure" from the method the law has declared] being that the rights of all parties to the contract of sale for taxes are fixed and governed by the statute under which the sale is made, and these rights cannot thereafter be substantially impaired under [the] clause . . . of the Federal Constitution" preventing the states from impairing the obligation of contracts. 182 Miss. at 416, 182 So. at 106. One might wonder how the former owner of the land became a party to the sale, for it would seem that only parties to the sale could have a defense based on impairment of the obligation of contract. But in Reid v. Federal Land Bank of New Orleans, 166 Miss. 392, 397, 148 So. 392, 393 (1933) the court said: "There are always three parties to a contract for the sale of land for the taxes thereon to a person other than the state—the owner of the land, the purchaser thereof, and the state. . . . The rights of all parties to the contract of sale are fixed and governed by the statute under which the sale was made, and they cannot thereafter be substantially impaired under clause 1, section 10, article 1, of the Federal Constitution."

"If the landholder is then to be considered a party to the contract, how can it be reasoned that it is not constitutional to cure a "substantial" breach of procedure which will deny his title, but that it is constitutional to cure a breach "not substantial" though it was just as much the law as the "substantial" breach at the time of the sale, and acts just as directly to prevent the owner defending his title; Thus, it may be said again, it would seem that the *Russell* case is attempting to apply a distinction between "substantial" and "non-substantial" breaches made in cases dealing with *prospective* curative statutes, where there was no question of violating the right of contract, to curative acts which are *retrospective,* and to which the distinction has no application.

On the other hand, the court has clearly determined that the statute may be construed as one of limitation.[30] Also the court has declared that a statute of limitations is not violative of constitutional rights though it applies to a right of action already in existence at the date of its enactment, provided a reasonable time is allowed for exercising the right after the date of enactment.[31] It would seem certain, then, that the statute may be applied to tax sales made before its enactment as a statute of limitation, but it will not run against one who is in possession.[32] However, the court goes on to say:

> "As applied to defects, irregularities, or illegalities in the assessment, levy and sale of land to the state for taxes, other than jurisdictional or constitutional objections, we are of the opinion that the constitutionality of the said chapter . . . , must be upheld; that within this limitation the statute may be successfully invoked as one of limitation . . . "[33]

But, if the statute is one of limitations, it cannot be the intention to say it can run only against irregularities other than those which are

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[30]In Russell Investment Corp. v. Russell, 182 Miss. 395, 416, 182 So. 102, 106 (1938) the court went so far as to say: "But Chapter 196 Laws of 1934, does not undertake to cure or validate defects. . . . It is purely a statute of limitation, and does not take away any vested rights but fixes a reasonable period of time in which they may be ascertained." This attitude that the statute is to be considered solely as a statute of limitation would appear negatived by the court in Lee v. Smith, 198 So. 296 (Miss 1940), where the third section of the act was recognized as curative in its operation. See also the cases cited note 7 *supra* in which the act was construed as a statute of limitation.

[31]Russell Investment Corp. v. Russell, 182 So. 395, 416, 182 So. 102, 106 (1938).

[32]Admitting that a statute of limitation will not run against one in possession (see note 11 *supra*), are there any circumstances under which a statute of limitations may run in favor of one not himself in actual adverse possession? It might be held that actual adverse possession is necessary in every case in order to give rise to a right of action on the part of the former owner which the statute may operate to bar. But this argument might be answered by holding that the statute indicates an intention on the part of the legislature to make the void tax deeds carry constructive possession. Or the court might go further to say that a tax deed or listing to the State, especially if it was valid upon its face, would carry constructive possession without the aid of a statute. Or it might be held, thus eliminating the necessity of possession in the purchaser to give rise to a right of action, that the claim under the tax deed should be proceeded against by the owner as an adverse claim against his title, which right of proceeding the statute might bar if it were not pursued.

But these views, though destroying the necessity of adverse possession by the tax-purchaser, cannot be construed to allow a statute to run against one in possession. Judge Cooley said: "Where they [statutes of limitation] relate to property, it seems not to be essential that the adverse claimant should be in actual possession; but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce." 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 763. It was further said by the same author, after determining that the statute might run in favor of a tax-purchaser in possession but never against the owner in possession: "In the . . . cases [in which the land is at the time of sale and remains afterward unoccupied] the proper rule is not so clear. If no provision is made by statute under which ejectment can be brought in the case of a vacant possession, it would seem that neither claimant could be considered in law negligent, so as to render his claim the proper subject

constitutional or jurisdictional in their natures. To so hold is to overrule the outstanding Mississippi case of *Hamner v. Yazoo Delta Lumber Co.*[34]

In the *Hamner* Case, the defendant, who claimed under tax sale pursuant to an unconstitutional assessment,[33] pleaded the three-year statute of limitations. The statute provided:

> "Actual occupation for three years, after one year from the day of sale, of any land held under a conveyance by a tax collector, in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale of such land for taxes, or in any precedent step in said sale . . . "[36]

This case and the fully published briefs of counsel present an excellent history of the Mississippi law of "limitation statutes" as applied to tax-titles.[37] Of great importance is the recognition, clearly set out, of

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of a statute of repose, until possession was taken by his adversary; but if ejectment is allowed in such cases, then it may possibly be within the power of the legislature to declare that the title of that one of the parties who, constructively, is to be regarded in possession, shall become absolute, if not questioned by suit within the time by the statute limited for that purpose." 4 COOLEY, TAXATION (4th ed. 1924) § 1511.

Thus it might be said in summary, that adverse possessions by the tax-purchaser may not be an absolute requirement. Without adverse possession by the purchaser, then, the statute might run against one who has abandoned his possession, or possibly against one who holds by constructive possession alone, but never against one who is in actual possession.

However, the Mississippi court has used language which might be taken to indicate that actual adverse possession by the tax-purchaser will be considered a prerequisite to the running of the statute. In the *Hamner* case it was said: " . . . the legislature recognized that a sale made under a void assessment is void, and . . . undertook under its constitutional power to validate, by a statute of limitation, these confessedly void sales, and as the *instrumentality* of such purpose made the *occupancy* of the lands the evidence of ownership, referring the title or ownership, not to the unconstitutional and therefore void procedings, but to the occupancy of the land held under those tax proceedings. If such be not the intention of the legislature, then such legislation is absolutely nugatory." Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 425, 56 So. 466, 492 (1911). Whether this case will be followed through rigid requirements of adverse possession remains to be seen. The possible views of the problem are merely presented here. In the recent case of Lee v. Smith, 198 So. 296 (Miss. 1940), neither party appeared to be in possession, but the question was not raised though other phases of construction under the statute were considered.

[33]Russell Investment Corp. v. Russell, 182 Miss. 385, 421, 182 So. 102, 108 (1938).

[34]100 Miss. 349, 56 So. 466 (1911); see also Litter v. Boddie, 104 Miss. 178, 61 So. 171 (1913).

[35]The assessment was made under the "Madison Act," Miss. Laws 1888, c. 9. The act was declared unconstitutional and sales held thereunder to be void in Hawkins v. Mangum, 78 Miss. 97, 28 So. 872 (1900).

[36]MISS. REV. CODE (1880) § 539, appearing today as MISS. CODE ANN. (1930) § 2288.

[37]The court, in discussing the *Dingey* case, speaks of the retrospective curative statute there construed as MISS. REV. CODE (1871) § 1709, which provides for a curative statute prospective in its operation. The retrospective statute dealt with in the *Dingey* case was Section 13 of Chapter 105 of the Laws of 1876. This mistake should be recognized. Nothing in the *Dingey* case nor the *Hamner* case should be taken as holding MISS. REV. CODE (1871) § 1709 unconstitutional.

a distinction between prospective curative statutes and statutes of limitations.[38] Also the court expressly overrules certain earlier authorities which denied the running of a statute of limitation against constitutional or jurisdictional defects affecting the validity of tax-titles.[39] In a summary of its holding the court plainly stated that prospective curative statutes might be defeated by showing a constitutional or jurisdictional defect in the proceeding, but that actual possession under a statute of limitation would bar recovery by the original owner.[40] After the limitation has run in favor of one in possession, it is only in cases where a valid tax sale itself could not have defeated the former owner's right that he could recover his property.[41] Therefore, if the act, as a statute of limitation, is held not to bar a cause of action because the defects in a tax-title are constitutional or jurisdictional in their nature, *Russell Investment*

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[38]Judge McLean said: "The principle which is announced in the case now before us is not at all at variance with the principle . . . that a sale for taxes, in order to be valid, must be upon a valid assessment: that generally a statute that cured or attempted to cure an invalid sale for taxes is predicated upon and presupposed a valid assessment. We again announce our full concurrence in this line of cases, but the courts in these authorities were treating of and construing statutes entirely different from the one now under consideration, and were applying those statutes to an entirely different state of facts from the one shown in this record. The statutes treated of in those cases were section 4332, Code 1906 (a rescript of section 3817, Code of 1902), and section 525, Code of 1880, and other similar statutes, where the legislature prescribed the time within which a suit should be brought to invalidate a tax-title, without any reference whatever to a case where the owner of the tax title had actually gone into possession of the land. . . . " Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 427, 56 So. 466, 493 (1911).

[39]The court said: "It is with much reluctance we overrule former opinions of this court, but our convictions are so strong as to constrain us to do so, and *Kennedy v. Sanders* [90 Miss. 524, 43 So. 913 (1907)], *Eastland v. Lumber Co.* [90 Miss. 330, 43 So. 956 (1907)], and *McLemore v. Anderson* [92 Miss. 42, 43 So. 878 (1907)], *supra,* are overruled, in so far as they conflict with this opinion." 100 Miss. at 435, 56 So. at 496. The opinion would seem also impliedly to overrule Seale v. Perkins, 96 Miss. 704, 51 So. 806 (1910).

[40]The court stated its conclusion: "In order that there may be no doubt as to what we hold, we summarize our holdings as follows: First. Under section 3817, Code of 1892 (section 525, Code 1880) [a prospective currative statute], the owner of the original title, at any time after two years from the date of sale and before the actual occupation for three years, can show the invalidity of the tax deed by establishing either one of the invalidities specified in section 3817, *supra,* and in addition thereto a void assessment or any other constitutional defect. Second, Under section 2735 of the Code of 1892 (section 539 of the Code of 1880) [a statute of limitation], actual occupation for three years after two years from the day of sale is an absolute bar to the original owner to set up any defense, or to test the right of the occupant claiming under the tax conveyance." 100 Miss. at 434, 56 So. at 495.

[41]See Hoskins v. Illinois C. R.R., 78 Miss. 768, 29 So. 518 (1901) (homestead lands not subject to taxation), and the discussion of its application to subsequent cases in Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 366, 56 So. 466, 472 (1911). See also Barker v. Jackson, 90 Miss. 621, 44 So. 34 (1907) (chancery clerk could not legally become purchaser at tax sale); Howell v. Miller, 88 Miss. 655, 42 So. 129 (1906) (swamp lands not subject to taxation); McGee v. Holmes, 63 Miss. 50 (1885) (purchaser stood in fiduciary relation to owner and could not legally become purchaser at tax sale). In Bookout v. Andrews, 25 So. 865 (Miss. 1899) (taxes levied in support of the rebellion) curative action was denied by the court on grounds that the intention to validate taxation in support of rebellion would not be imputed to the legislature.

Corp. v. Russell[42] overrules *Hamner v. Yazoo Delta Lumber Co.*[43] However, it is not believed the court intended so to hold. It would appear that the court based its reasoning upon cases construing prospective curative statutes and that the reasoning should have no application to statutes of limitation in Mississippi. The opinion and briefs in *Hamner v. Yazoo Delta Lumber Co.*[44] clearly point to the fallacy.

The Prospective Aspect

The court has not rendered an opinion construing the statute in regard to void tax sales made since its enactment. However, only one of two constructions seems possible.

If the statute is to be considered merely a statute of limitation,[45] then it can run only in favor of the tax-purchaser in possession.[46] However, the statute would bar recovery where the defect in the tax-title was constitutional or jurisdictional in its nature unless the *Russell* case is considered as overruling the *Hamner* case.

On the other hand, the court has recognized that the provisions of the statute go further than those of a mere statute of limitation. In *Lee v. Smith*[47] the court said:

> "Section 3 of Chapter 196, Laws of 1934, however, is more than a mere statute limiting the time within which to bring an action to cancel the title of the state to land sold to it for taxes (*c.f.* Russell Investment Corp. v. Russell, supra); for, on the expiration of the time limit in Section 1 of the chapter, it 'extinguish[es] all the right . . . in and to such land, of any and all persons whatsoever', etc."

Thus it would seem probable that the statute might operate both as a statute of limitation and as a curative act. Prospective action as a statute of limitation has already been considered. What would be the effect of the statute as a curative act applied prospectively?

The distinction between prospective curative acts and statutes of limitation was recognized and commented upon in the *Hamner* case where cases construing prospective curative acts were cited and approved.[48]

The early curative acts affecting tax-titles were those of 1860,[49] pro-

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[42]182 Miss. 385, 178 So. 815, 182 So. 102 (1938).
[43]100 Miss. 349, 56 So. 411 (1911).
[44]*Ibid.*
[45]See note 30 *supra.*
[46]As to whether or not a statute of limitations may run in favor of a tax-purchaser not in actual possession, see note 32 *supra.*
[47]198 So. 296, 298 (Miss. 1940).
[48]See note 38 *supra.*
[49]"That all sales of lands hereafter made for non-payment of taxes, due under any law of this state, shall be valid to all intents and purposes . . . and that no such sale shall be impeached or questioned in any manner or for any cause, saving fraud or mistake in the assessment or sale of the same, or upon the proof that the tax for which the same were sold had been paid prior to such sale, and no suit to set

viding that all defects would be cured after five years, and of 1871,[50] providing a three-year period. These acts were held to run, as to certain irregularities in purely statutory procedure, against an owner in possession and in favor of the tax-purchaser though he had never taken possession. In the case of *Nevin v. Bailey*[51] it was said:

> "It may be seriously doubted whether the statute partakes more of the character of a statute of limitations than of one declaring a rule of evidence or operating as a curative act. Whatever its appropriate name may be, its effect is to preclude any inquiry into the validity of a tax sale made after its passage and more than three years before the institution of the suit in which the deed of the purchaser is assailed as to any defective or irregular execution of those powers or duties which are conferred or imposed on the officers conducting the sale by the legislature and not by the Constitution of the State. . . . It existed as a part of the revenue laws of the State, and its declaration was an admonition to those owning property subject to taxation, and an assurance to those who should become purchasers at tax sales, that after the lapse of a certain time from the day of the sale for taxes all those requirements imposed by the legislature should be read as directory and not mandatory laws, and that no failure to conform thereto should be held to invalidate the title acquired by the purchaser."

As to whether a curative act would run against one in possession, in the case of *Sigmund v. Lundy*,[52] the court said:

> "Whether the purchaser at tax sale or the former owner was in possession of the land sold; whether the land was occupied or vacant, the security afforded by the act existed. The provision as to further sales was intended to be, and was, an irrevocable and irreparable stipulation that after the lapse of time named no assailment of the title should be made. It was, and was intended to be, a part of the contract into which the purchaser would enter, an inherent, continuing element of right secrued, running with the land and a perpetual security of the title."

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aside any title acquired under such sale, hereafter to be made, shall be brought, unless within five years from the date of the sale." Miss. Laws 1860, c. 154, § 7.

[50]" . . . *provided,* the time for redeeming the same has expired; and no suit shall be commenced in any court of this state to invalidate any tax titles to lands, after three years from the time said land was sold for taxes; and no tax titles now held to any land heretofore sold for taxes, after the time for redeeming the same has expired, shall be invalidated in any court of this state, except for the reason specifically set forth in this article." Miss. Rev. Code (1871) § 1709.

[51]62 Miss 433, 436 (1884).

[52]66 Miss. 522, 529, 6 So. 245, 247 (1889).

As to the irregularities that might be healed by a prospective curative statute, numerous decisions construing the statutes of 1860[53] and 1871[54] adopted the view that the acts might heal any defect which was not jurisdictional or constitutional in its nature.[55] At the same time, certain other decisions construing those acts might be interpreted as intending to include a larger field of irregularities which could not be cured.[56] And, beginning with *Griffin v. Ellis*,[57] the court would seem definitely to include within the class of "non-curable" defects those which amount to a "total departure" from the purely statutory provisions of the legislature.[58] Under this last precident, one can only speculate as to the length the court will go in denying prospective curative action. What is jurisdictional and what is not is a matter of much uncertainty.[59] There would appear to be an even less definite standard to guide the court in determining whether a breach is "a substantial departure" or "a total departure" from the statutory provisions. Only through precedent can one determine what is to be designated "substantial" and what is not. It should be noted that these cases have gone a long way toward destroying the strength and virility of the prospective curative statutes. In *Yazoo-Delta Mortgage Co. v. Lumbley*,[60] Judge Anderson, in a dissenting opinion in which Judge Smith concurred, said:

> "If [the prospective curative statutes in question] . . . do not cure such irregularities in tax sales, I am unable to see what the purpose of those statutes was. . . . It is true that our court has held that neither of these statutes was intended to validate a tax sale where the requisite *fundamentals* for such a sale have been violated. But the failure of the tax collector, through error or otherwise, in properly calculating the true amount of the delin-

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[53]See note 49 *supra*.

[54]See note 50 *supra*.

[55]Bell v. Coats, 54 Miss. 538 (1877); Nevin v. Bailey, 62 Miss. 433 (1884); Gibson v. Berry, 66 Miss. 515, 6 So. 325 (1889); Sigmund v. Lundy, 66 Miss. 522, 6 So. 245 (1889); Carlisle v. Yodler, 69 Miss. 384, 12 So. 255 (1891); Jones v. Flannilen, 69 Miss. 577, 11 So. 319 (1891); Cole v. Coon, 70 Miss. 634, 12 So. 899 (1895); Woodruff v. State, 77 Miss. 68, 25 So. 483 (1899).

[56]Griffin v. Dogan, 48 Miss. 11 (1873); Virden v. Bowers, 55 Miss. 1 (1877); Read v. Heard, 97 Miss. 743, 53 So. 400 (1910).

[57]63 Miss. 348 (1885).

[58]It is interesting to note that in only two cases cited in the *Griffin* case as authority was a curative act or statute of limitation considered. The two exceptions related to defects plainly jurisdictional in their nature. For other decisions following the *Griffin* case, see Yazoo Delta Mortgage Co. v. Lumbley, 149 Miss. 864, 116 So. 95 (1928); Womack v. Central Lumber Co. 131 Miss. 201, 94 So. 2 (1922); Nelson v. Abernathy, 74 Miss. 164, 21 So. 150 (1896).

[59]The value of classifying irregularities as "jurisdictional" and "non-jurisdictional" has often been questioned. One author has said: "If the defect is jurisdictional, it cannot be cured; if not jurisdictional it can be cured. But this has proved to be an elusive distinction. As has been pointed out, it may not mean the same thing for a court as for a legislature. . . . The distinction fails to be of use, then, except to classify conclusions after they have already been reached on other grounds." Smith, *Retroactive Laws and Vested Rights* (1927) 5 Tex. L. Rev. 231, (1928) 6 Tex. L. Rev. 409, also in 2 Selective Essays on Constitutional Law (1938) 266.

[60]149 Miss. 864, 116 So. 95, (1928).

quent taxes and damages due by the taxpayer, is not one of the fundamental requisites of a valid tax sale."[61]

Therefore, it would seem that as a statute of limitations the law should act prospectively to bar, in favor of one in possession, all question of a defective tax-title. And also, in favor of a purchaser not in possession, it should, as a prospective curative statute, on the mere passage of time, bar all defects other than those constitutional or jurisdictional in their nature or those which the court determines to be "total departures" from the method the law has specifically and plainly declared.[62]

Walter R. Bridgforth.

When Is a Foreign Corporation "Doing Business" In Mississippi?

Under several Mississippi statutes,[1] jurisdiction over foreign corporations and the amenability of their agents to process, and the right of the foreign corporation to use the courts of this state depends upon an interpretation by the court of whether or not that corporation is "doing business" within the meaning of the particular statute applicable.

In determining this question the courts have laid down no all-embracing rule as to what is contemplated by "doing business,"[2] but have stated generally that the foreign corporation must have entered the state for the purpose of carrying on its business there.[3] The courts have held that the question is one of fact[4] and is to be decided according to the

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[61]*Id.* at 873, 116 So. at 97.

[62]The section of the article dealing with the retrospective aspect has application only to tax-titles arising under sales made between January 1, 1928, and April 4, 1934. It should be noted that cases concerning these sales will be relatively few in the future, and the great volume of litigation will probably be concerned with the prospective aspect.

[1]Miss. Code Ann. (1930) §§ 4140, 4164, 4166, 4167.

[2]St. Louis Southwestern R.R. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. ed. 486 (1912); Empire Fuel Co. v. Lyons, 257 Fed. 890 (C.C.A. 6th, 1919); Pembleton v. Illinois Commercial Men's Ass'n, 289 Ill. 99, 124 N.E. 355 (1919); Atkinson v. U. S. Operating Co., 129 Minn. 232, 153 N.W. 410 (1915); Fead, *Jurisdiction Over Foreign Corporations* (1926) 24 Mich. L. Rev. 633, 639; Note (1923) 36 Harv. L. Rev. 327.

[3]People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. ed. 587 (1918); St. Louis Southwestern R.R. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. ed. 486 (1912); Walsh v. Atlantic Coast Line Ry., 256 Fed. 47 (D. C. Mass. 1919); Golden v. Connersville Wheel Co., 252 Fed. 904 (D. C. Mich. 1918); General Investment Co. v. Lake Shore & M. S. Ry., 250 Fed. 160 (C.C.A. 6th, 1918); Smithson v. Roneo, 231 Fed. 349 (D. C. N. Y. 1916).

[4]Smithson v. Roneo, 231 Fed. 349 (D. C. N. Y. 1916); Saccharin Corp. v. Chemische Fabrik von Heyden Aktiengesellschaft, [1911] 2 K.B. 516; 14A C.J. § 4079, p. 1372.

facts of each individual case[5] rather than by the application of fixed, definite, and precise rules.[6]

The courts of other states have seen fit to apply different rules in determining the applicability of the different types of statutes within the same state.[7] This is due perhaps to the nature of the statute being construed. If the statute is one stating that a corporation must qualify before doing business in order to have access to the courts of the state or to entitle it to recover on a contract made in this state,[8] the courts are naturally inclined to construe it strictly in favor of the corporation.[9] However, if the question involved is that of the sufficiency of service of process or determination of whether the state court has jurisdiction,[10] a different interest is involved since a strict construction in favor of the corporation might force the citizens of the state to resort to another jurisdiction in order to maintain suits against foreign corporations. This distinction should be kept in mind in conducting an analysis of the cases involving "doing business," because even though it may not be discussed in a particular case, it is probable that this matter is not entirely absent from the mind of the court.

This distinction will cause a question to arise as to whether the decisions as to "doing business" under one type of statute should be considered authoritative in determining cases arising under the other type statutes. There would seem to be no difficulty in referring to the decisions under one type of statute in deciding cases under the other type if it be kept in mind that the case under observation was decided under another kind of statute. Certainly decisions holding acts to constitute "doing business" under the statutes giving the corporation the right to sue in the courts of the state only after qualifying should be authoritative in cases arising under the process or jurisdictional statutes since, as was pointed out above, the requirement under the latter type statutes seems to be less stringent.[11] The reverse, however, is not true.

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[5]People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. ed. 587 (1918); International Harvesting Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. ed. 1479 (1913); Pomeroy v. Hocking Valley Ry., 218 N. Y. 530, 113 N.E. 413 (1916); Rosenblatt v. Bridgeport Metal Mfg. Co., 105 Misc. 92, 173 N. Y. Supp. 331 (Sup. Ct. 1919).

[6]Atchison T. & S. F. Ry. v. Weeks, 248 Fed. 970 (D. C. Tex. 1918); Pomeroy v. Hocking Valley Ry., 218 N. Y. 530, 113 N.E. 504 (1916).

[7]Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917); Fead, *Jurisdiction Over Foreign Corporations* (1926) 24 MICH. L. REV. 633, 639; Note (1923) 36 HARV. L. REV. 327. No attempt is made in this note to collect the cases considering the problem of when a corporation is "doing business" within the state for the purpose of the taxation statutes.

[8]For example see MISS. CODE ANN. (1930) §§ 4140, 4164.

[9]Penal laws are to be strictly construed. SUTHERLAND, STATUTORY CONSTRUCTION (Lewis' ed. 1904) 961, § 520.

[10]For example see MISS. CODE ANN. (1930) §§ 4166, 4167.

[11]There is also recognized the distinction between the amount of business required under the "venue" statues and that required under the other types of statues. See for example Lechler Laboratories, Inc. v. Duart Mfg. Co., 35 F. Supp. 839, 840 (D. C. N. Y. 1940) where is was said: "It is settled that the quantum of business which

"Doing Business" Under the Jurisdiction and Process Statutes

No attempt will be made to analyze the various bases and theories underlying the exercise of jurisdiction over foreign corporations. It may be said that the courts have unanimously recognized that they have jurisdiction over foreign corporations "doing business" within the state.[12]

It has been stated that regardless of the form of the statute authorizing jurisdiction over and service of process on a foreign corporation not actually consenting to the jurisdiction, it is a fundamental requisite under the Federal Constitution that the corporation shall be "doing business" in the state or district where the service is made in order to sustain its validity.[13] This is based upon the ground that the question of whether a foreign corporation is doing business in the state in such a sense as to subject it to the jurisdiction of the courts and to make it amenable to the service of process is not one of local law[14] or of statutory construction,[15] but is a jurisdictional fact under the "due process" clause of the Fourteenth Amendment;[16] and a decision that the corporation is subject to the jurisdiction of the state is reviewable by the courts of another state or by the federal courts unless the corporation appeared in the case generally, or specially on the question of jurisdiction, and had a hearing on that question.[17]

The Mississippi court has had few cases in which it has had to determine whether or not a foreign corporation was transacting sufficient business within this state to bring it within the term "doing business" and thus subject it to the jurisdiction of our courts and make it amenable to process. The Mississippi statutes[18] have been construed by the court to

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must be transacted by a corporation in a district to place the venue of an action under the anti-trust acts is less than 'doing business' which is necessary to sustain the service of process. . . . " For a Mississippi case requiring the foreign corporation to be "doing business" in the county where suit is brought in order that a court of that county be a court of proper venue, see American Surety Co. v. Holly Springs, 77 Miss. 428, 27 So. 605 (1899). Limitations of space prevent a discussion of the quantum of business required to classify a foreign corporation as "doing business" in this state under the numerous taxation statutes.

[12]Paul v. Virginia, 8 Wall. 168 (U. S. 1869); Fead, *Jurisdiction Over Foreign Corporations* (1926) 24 MICH. L. REV. 633; Isaacs, *An Analysis of Doing Business* (1925) 25 COL. L. REV. 1018; Scott, *Jurisdiction Over Non-Resident Motorists* (1926) 39 HARV. L. REV. 563.

[13]See Note (1929) 29 COL. L. REV. 187.

[14]Frawley v. Pennsylvania Casualty Co., 124 Fed. 259, 262 (C.C. Pa. 1903).

[15]Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N.E. 915 (1917).

[16]People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. ed. 587 (1918); Riverside & Dan River Cotton Mills v. Menafee, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. ed. 911 (1915); Old Wayne Mutual Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345 (1907); Note (1929) 29 COL. L. REV. 187.

[17]Hall v. Wilder Mfg. Co., 316 Mo. 812, 293 S.W. 760 (1927); BALLANTINE, CORPORATIONS (1927) 862-863; Note (1928) 52 A.L.R. 740.

[18]MISS. CODE ANN. (1930) §§ 4166, 4167. Section 4166 provides that foreign corporations are subject to suit in Mississippi and Section 4167 makes provision for service of process upon an agent who represented the corporation at the time the transaction out of which the suit arose took place.

mean that when a foreign corporation does a local business in this state without qualifying according to the terms of these statutes, the courts of this state nevertheless acquire jurisdiction over such corporations and process may be served upon a person who represented the corporation at the time the transaction took place.[19]

The question as to whether the person served is, in view of the nature of his duties, such an agent as may be served with process so as to bind the corporation is a distinct one from the question of whether the corporation is present within the jurisdiction itself.[20] Where a corporation is not doing business in a state it is not brought therein so as to be subject to the jurisdiction of the courts by the mere presence in the state of one or more of its officers or agents.[21] But where the corporation is doing business in the state, process may be served on an officer or agent temporarily in the state or present on private business.[22]

In the case of *Saxony Mills v. Wagner*,[23] one of the first Mississippi cases involving the question of "doing business" under the jurisdictional and process statutes,[24] the court held that a corporation did not come within the jurisdiction of the Mississippi courts by sending an agent into the state for the purpose of securing orders which were in turn transmitted to the home office and filled by shipment direct to the purchaser. The court held that these acts did not constitute "doing business" within the purview

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[19]Gridley, Maxon & Co. v. Turner, 179 Miss. 890, 900, 176 So. 733, 735 (1937).

[20]Golden, Balknap & Swartz v. Connersville Wheel Co., 252 Fed. 904 (D. C. Mich. 1918); 23 AM. JUR. 344, § 363; 14A C. J. 1374, § 4081.

[21]Toledo Ry. & Light Co. v. Hill, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. ed. 982 (1916); Louden Machine Co. v. American Malleable Iron Co., 127 Fed. 1008 (C.C. Iowa 1904); Edwards v. Schllinger, 245 Ill. 231, 91 N.E. 1048 (1910); Mutual Reserve Fund Life Ass'n v. Boyer, 62 Kan. 31, 61 Pac. 387 (1900); Southern Sawmill Co. v. American Hardwood Lumber Co., 115 La. 237, 38 So. 977 (1905); Walter A. Zelnicker Supply Co. v. Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S.W. 321 (1904); Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N.E. 915 (1917); Phillips v. Burlington Library Co., 141 Pa. 462, 21 Atl. 640 (1891). But see Jester v. Baltimore Steam Packet Co., 131 N. C. 54, 42 S.E. 447 (1903) in which the contrary was held. A subsequent North Carolina decision to this effect was reversed by the United States Supreme Court in Riverside & Dan River Cotton Mills v. Menafee, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. ed. 910 (1915).

[22]Venner v. Denver Union Water Co., 40 Colo. 212, 90 Pac. 623 (1907); Shickle Iron Co. v. S. L. Wiley Construction Co., 61 Mich. 226, 28 N.W. 77 (1886); Atkinson v. United States Operating Co., 129 Minn. 232, 152 N.W. 410 (1915); Smith v. Western Pac. Ry. 154 App. Div. 130, 139 N. Y. Supp. 129 (1st Dep't 1913); Cameron v. Jones, 90 S.W. 1129 (Tex. Civ. App. 1906); American Foods Products Co. v. American Milling Co., 151 Wis. 385, 138 N.W. 1123 (1913). It has been held that a statute which denies the right of a foreign corporation which has failed to comply with its requirements to maintain any suit in the state courts on any contract, and is not limited by its terms to contracts made within the state, will bar the right of such a corporation to maintain an action on a contract which it not only made but is to be performed outside the state. J. Walter Thompson Co. v. Whitehead, 185 Ill. 454, 56 N.E. 1006 (1900).

[23]94 Miss. 233, 47 So. 899 (1908).

[24]MISS. CODE ANN. (1930) §§ 4166, 4167.

of the statute.[25] This constitutes the majority American rule in cases involving mere soliciting agents.[26]

It should be noted that in this case the question before the court was not whether the scope of the authority of the agent was sufficiently broad to allow service upon such agent to bind the corporation, but whether the corporation was doing business within the state.[27]

In a case arising several years later, the Mississippi court held that the maintenance of an action in the courts of the state was not sufficient transaction of business to allow service upon the attorney representing the corporation in the actions and thereby bring the corporation within the jurisdiction of the court.[28] This holding that the bringing of an action in the courts of the state does not constitute "doing business" is also one that is followed by a majority of the states.[29]

The Mississippi Court has held that the presence, in their capacity as trainmen, of members of the Brotherhood of Railway Trainmen was a sufficient "doing business" in this state to bring the brotherhood within the jurisdiction of the courts of this state and to render the secretary of the state lodge a proper person upon whom process might be served.[30]

In the most recent case[31] coming before the court on this question, it was held that purchases of pecans in the state by an agent, and shipment

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[25]But compare Columbia Star Milling Co. v. Brand, 115 Miss. 625, 76 So. 557 (1917), where it was held that the court did not acquire jurisdiction because a copy of the process was not mailed to the corporation, but language used by the court seemed to indicate that if a copy of the process had been mailed that the service upon the traveling salesman would have been sufficient.

[26]Green v. Chicago, Burlington & Quincey Ry., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. ed. 916 (1906); Hilton v. Northwestern Expanded Metal Co., 16 F.(2d) 821 (D. C. Ga. 1927); Boardman v. McClure Co., 123 Fed. 614 (C.C. Minn. 1903); Ware v. Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136 (1891); George H. Cox Co. v. Phonograph Co., 208 Ky. 398, 270 S.W. 811 (1925); National Pumps Corp. v. Bruning, 1 So.(2d) 320 (La. 1941); Coit v. Sutton, 102 Mich. 324, 60 N.W. 690 (1890); Abramovich v. Continental Can Co., 166 Minn. 151, 207 N.W. 201 (1926); Watkins v. Donnell, 192 Mo. App. 640, 179 S.W. 980 (1915); McDowell v. Starobin Electric Supply Co., 104 Misc. 596, 172 N. Y. Supp. 221 (1st Dept. 1918); 8 THOMPSON, CORPORATIONS (3d ed. 1927) 865, § 6633.

[27]Process must be served upon an agent sustaining such a relation to the corporation that notice to the agent may well be deemed notice to the principal, without a violation of the Principles of natural justice. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222 (1881); Good Roads Mach. Co. v. Commonwealth, 146 Ky. 690, 143 S.W. 18 (1912); Wold v. J. B. Colt Co., 102 Minn. 386, 114 N.W. 243 (1908); Doctor v. Desmond, 80 N. J. Eq. 77, 82 Atl. 522 (1912).

[28]Delta Ins. & Realty Agency v. Fourth Nat. Bank of Montgomery, 146 Miss. 11, 111 So. 435 (1927).

[29]Lane v. Equitable Trust Co., 262 Fed. 918 (C.C.A. 8th, 1920); Worth v. Knickerbocker Trust Co., 171 Ala. 621, 55 So. 144 (1911); Martin v. Bankers' Trust Co., 18 Ariz. 55, 156 Pac. 87 (1916); Linton v. Erie Ozark Mining Co., 147 Ark. 331, 227 S.W. 411 (1921); United Shoe Mach. Co. v. Ramlose, 231 Mo. 508, 132 S.W. 1133 (1911); Fresno Home Packing Co. v. Turle, 132 App. Div. 930, 117 N. Y. Supp. 1134 (1st Dept. 1909); 23 AM. JUR. 861, § 366.

[30]Brotherhood of Railroad Trainmen v. Agnew, 170 Miss. 604, 155 So. 205 (1934).

[31]Gridley, Maxon & Co. v. Turner, 179 Miss. 890, 176 So. 733 (1937).

to the home office in Chicago was sufficient business to bring the corporation within the purview of the statute and render the corporation amenable to service of process in an action arising out of the transaction.[32] This view is in accord with the weight of authority, which is to the effect that a foreign corporation may be doing business in the state in the sense required to subject it to suit there, even though such business is entirely interstate commerce.[33] The fact that the business is entirely interstate in character does not keep it from being "business" or from being "done" within the state. Not every aspect of the business needs to be accomplished within the state in order for the business to be done within it and for the state to have jurisdiction over the corporation under the terms of the due process clause. In the case where the business is entirely interstate, however, assumption of jurisdiction over a corporation may be restricted for the independent reason that it is an unreasonable burden upon interstate commerce and thus a violation of the Commerce clause of the Federal Constitution. In practice this constitutional restriction has been confined to cases of interstate carriers and its exact scope is not yet clear.[34]

"Doing Business" Under the So-Called Qualifying Statutes

Mississippi has two statutes[35] which have been held to mean that if a foreign corporation has failed to qualify to do business in the state and is "doing business" in the state, it cannot sue in the courts of this state upon

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[32]While only one transaction was discussed by the court, it may be assumed from the opinion that there was an intention to do additional acts. In a number of decisions holding that a single transaction does not constitute "doing business," stress is placed upon the circumstance that there was no intention to do any other business in the state. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. ed. 1137 (1884); John Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. 863 (1904); Commercial Bank v. Sherman, 28 Ore. 573, 43 Pac. 658 (1896). However, when the single act is the first of a series of acts, this rule is not followed. Lowenmeyer v. National Lumber Co., 71 Ind. App. 458, 125 N.E. 67 (1920); Harnischfeger Sales Corp. v. Sternberg Co., 179 La. 317, 154 So. 10 (1934); Dahl Implement & Lumber Co. v. Campbell, 45 N.D. 239, 178 N.W. 197 (1918); Tri-State Amusement Co. v. Forest Highlands Amusement Co., 192 Mo. 404, 90 S.W. 1020 (1906); Note (1928) 55 A.L.R. 729.

[33]International Harvester Co. v. Kentucky, 234 U. S. 589, 34 Sup. Ct. 947, 58 L. ed. 1484 (1913); W. J. Armstrong Co. v. New York C. & H. R.R., 129 Minn. 104, 151 N.W. 917 (1915); Willis v. National Mineral Co., 176 Okla. 193, 55 P.(2d) 449 (1936); 23 Am. Jur. 344, § 364; Notes (1936) 104 A.L.R. 1075, (1936) 101 A.L.R. 127.

[34]International Mill Co. v. Columbia Transp. Co., 292 U. S. 511, 54 Sup. Ct. 797, 78 L. ed. 1396 (1934); Denver & R. G. Western R.R. v. Terte, 284 U. S. 284, 52 Sup. Ct. 152, 76 L. ed. 295 (1931); Gloeser v. Dollar S.S. Lines, 192 Minn. 276, 256 N.W. 666, 95 A.L.R. 1470 (1935); 23 Am. Jur. 509, § 498; Restatement, Conflict of Laws (1934) § 92; Culp, *Constitutional Problems Arising From Service of Process on Foreign Corporations* (1935) 19 Minn. L. Rev. 375; Kinnelly, *What Constitutes Doing Business By A Foreign Corporation?* (1940) 15 Ind. L. J. 520; Note (1936) 104 A.L.R. 1075.

[35]Miss. Code Ann. (1930) §§ 4140, 4146.

a cause of action arising out of the business transacted.[36] The first of these statutes[37] was passed in 1918 and provides:

> "Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory, now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation . . . and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this article, shall be liable to a fine of not less than $100.00."

For convenience this statute will be referred to as the *penal* statute. The cases which arose under this penal statute and which were decided prior to the enactment of the later section,[38] which will be referred to as the *procedural* statute, were based upon the ground that a contract or a transaction by a foreign corporation that had failed to comply with the statutory requirements was *void,* and thereby could not be the basis of a recovery in the courts of this state.[39]

The cases arising since the passage of the later section, with two exceptions,[40] seem to have been based upon the wording of the procedural

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[36]Morrison v. Guaranty Mortgage & Trust Co., 199 So. 110 (Miss. 1940); Refrigeration Discount Corp. v. Turley, 198 So. 731 (Miss. 1940); Case v. Mills Novelty Co., 193 So. 625, 126 A.L.R. 1102 (Miss. 1940); C.I.T. Corp. v. Stuart, 185 Miss. 140, 187 So. 204 (1939); Marx & Bensdorf, Inc. v. First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297 (1937); North America Mortgage Co. v. Hudson, 176 Miss. 266, 168 So. 79 (1936); Wiley Electric Co. v. Electric Storage Battery Co., 167 Miss. 842, 147 So. 773 (1933); Dodds v. Pyramid Securities Co., 165 Miss. 269, 147 So. 328 (1933); Peterman Construction & Supply Co. v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930); Long Beach Canning Co. v. Clark, 141 Miss. 177, 106 So. 646 (1926); Item Co. v. Shipp, 140 Miss. 699, 106 So. 437 (1925); Harleston v. West Louisiana Bank, 129 Miss. 111, 91 So. 423 (1922); Union Cotton Oil Co., v. Patterson, 116 Miss. 802, 77 So. 795 (1917); Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211 (1941). There has been no direct holding that a corporation which has failed to comply with the statute may not maintain suit upon a cause of action that arose outside of the state, but the wording of Section 4140 indicates that it is a procedural statute and would apply to any cause of action. There is *dictum* in the case of Wiley Electric Co. v. Electric Storage Battery Co., *supra,* to the effect that, "This statute closes the door of the courts of this state to foreign corporations doing business in this state in violation of its provisions. . . . " 167 Miss. at 855, 147 So. at 777. Also see note 22 *supra.*

[37]Miss. Code Ann. (1930) § 4164.

[38]Miss. Code Ann. (1930) § 4140. For the language of this section, see Note 51 *infra,* and accompanying text.

[39]Case v. Mills Novelty Co., 193 So. 625, 126 A.L.R. 1102 (Miss. 1940); Peterman Construction & Supply Co. v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930); In Quartette Music Co. v. Haygood, 108 Miss. 755, 767, 67 So. 211, 212 (1914), the court said: "In Bohn v. Lowery, 77 Miss. 427, 27 So. 605, this rule is approved: 'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute.' "

[40]Case v. Mills Novelty Co., 193 So. 625, 126 A.L.R. 1102 (Miss. 1940); Peterman Construction & Supply Co. v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930).

statute; and although the penal statute was cited, the court seemed to place the decisions upon the procedural statute.[41]

In the first case[42] raising the question of what constitutes "doing business" under the penal statute, there was involved an action upon a promissory note given for certain goods. The defense set up was that the goods were sold under a contract executed by a foreign corporation that had not qualified to do business in this state and that because of the statute this contract was not enforceable in the courts of this state. The court upheld the contention of the defendant and based its decision upon the ground that the acts of the plaintiff corporation were sufficient to bring it within the purview of the statute. The acts which were held to have constituted "doing business" were the maintenance of a branch house and the carrying on of business through an agent who operated this branch house.[43] The court based its decision upon the ground that the alleged contract was *void,* and not upon the ground that this corporation had no right to sue in the courts of this state.[44]

The Mississippi Court has held that the phrase "doing business" as used in the statutes under discussion means intrastate business, and that interstate business does not come within the meaning of these statutes.[45]

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[41]Morrison v. Guaranty Mortgage & Trust Co., 199 So. 110 (Miss. 1940); Refrigeration Discount Corp. v. Turley, 198 So. 731 (Miss. 1940); C.I.T. Corp. v. Stuart, 185 Miss. 140, 187 So. 204 (1939); Marx & Bensdorf, Inc. v. First Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297 (1937); North America Mortgage Co. v. Hudson, 176 Miss. 266, 168 So. 79 (1936); Wiley Electric Co. v. Electric Storage Battery Co., 167 Miss. 842, 147 So. 773 (1933); Dodds v. Pyramid Securities Co., 165 Miss. 269, 147 So. 328 (1933).

[42]Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211 (1914).

[43]This view is generally followed. See St. Louis Southwestern Ry. v. Alexander, 227 U. S. 218, 333 Sup. Ct. 245, 57 L. ed. 486 (1912); Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 23 Sup. Ct. 206, 47 L. ed. 328 (1902); Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288 (C.C.A. 4th, 1906); Osborne v. Shilling, 74 Kan. 675, 88 Pac. 258 (1907); Central of Georgia R.R. v. Eichberg, 107 Md. 363, 68 Atl. 690 (1907); Hemphill v. Orloff, 238 Mich. 508, 213 N.W. 867 (1927); 23 Am. Jur. 385, § 382; 8 Thompson, Corporations (3d ed. 1927) 847, § 6627.

[44]Where a foreign corporation cannot maintain an action to enforce a non-negotiable chose in action, because of its failure to comply with the local statutes in relation to foreign corporations, one to whom it assigns the same cannot maintain an action, "as the assignee of a chose in action stands exactly in the shoes of his assignor." Thomas v. Birmingham Ry. Light & Power Co., 195 Fed. 340 (D. C. Ala. 1912); Hogan v. Intertype Corp., 136 Ark. 52, 206 S.W. 58 (1918); United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 S.W. 567 (1908); New State Land Co. v. Wilson, 150 S.W. 253 (Tex. Civ. App. 1912). It has been held that a receiver of a foreign corporation is not an assignee within the meaning of such a statute, and was therefore not prohibited from maintaining an action on a contract made in the state by the corporation before his appointment Underhill v. Rutland Ry., 90 Vt. 462, 98 Atl. 1017 (1916). Under a similar statute, however, the contrary has been held. Meyers v. Spangenberg Co., 65 Misc. 475, 120 N. Y. Supp. 174 (Sup. Ct. 1910). See also Note (1900) 28 Calif. L. Rev. 648.

[45]Union Cotton Oil Co. v. Patterson, 116 Miss. 802, 77 So. 795 (1917). This case was decided under Sec. 4164 prior to the enactment of Sec. 4140, but from the indications of the court, it is likely that it will follow the same principle today under the new section. See also Item Co. v. Shipp, 140 Miss. 699, 106 So. 437 (1925).

It should be noted that under the jurisdictional and process statutes the classification of business as interstate would not preclude the application of those statutes.[46] This is an important distinction which exists between the various types of statutes.

The transaction of an isolated piece of business, such as the purchase at a foreclosure sale, or the lease and sublease of property acquired because of default of indebtedness created in another state, has been held not to be a sufficient "doing business" so as to preclude the corporation from maintaining a suit in the courts of this state.[47]

The statute does not apply where the cause of action arose from a transaction entered into solely for the purpose of ceasing to do business in the state.[48] The court stated in this case that it was necessary that the transaction involved in the suit grow out of the operation of the business[49] and a corporation "having acquired property in this state, had a right to dispose of it regardless of the fact that it had previously done business in the state contrary to the public policy and statutes of the state."[50]

The second statute,[51] which has been classed as a procedural statute, was passed in 1928[52] and provides:

> ". . . Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent . . . upon whom service of process may be had in the event of any suit against such corporation. . . . Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

With two exceptions[53] all of the cases decided since the passage of this section have proceeded upon the ground that the corporation had no right, in the face of this statute, to bring suit in the courts of the state on transactions arising out of business conducted in the state in violation of the statute.[54]

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[46]See note 33 *supra.*

[47]Harleston v. West Louisiana Bank, 129 Miss. 111, 91 So. 423 (1922). This is in line with the holding in regard to the process and jurisdictional statutes. See cases cited in note 32 *supra.*

[48]Long Beach Canning Co. v. Clark, 141 Miss. 177, 106 So. 646 (1926).

[49]*Id.* at 185, 106 So. at 648.

[50]*Ibid.* It should be noted that this decision was under the *penal* statute and the corporation was attempting to cease violation of the law, which factor is likely to have influenced the court in its decision.

[51]Miss. Code Ann. (1930) § 4140.

[52]See Miss. Laws 1928, c. 90.

[53]Case v. Mills Novelty Co., 193 So. 625, 126 A.L.R. 1102 (Miss. 1940); Peterman Construction & Supply Co. v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930).

[54]See note 36 *supra* for a discussion as to whether or not the corporation which has failed to comply with the section under discussion may sue upon a cause of action arising out of the state.

In the construction of "doing business" under this procedural statute, the same test seems to have been applied as was applied under the penal statute. In one case the court cites both sections in support of its opinion, but seems to base its decision, with the exceptions noted, upon the procedural section.[55]

The court has held that the promotion and sale of stock for the construction of a canning plant, followed by the construction of the plant, where the company's business was that of promoting and constructing plants, constituted "doing business" under these statutes; and that the subsequent compliance with the statute would not render contracts made before compliance enforceable.[56] This case is to be properly considered under the penal section rather than under the procedural section since both sections had been complied with at the time suit was brought; but the court seemed to base its decision equally upon the two sections.

The case of *Wiley Electric Co. v. Electric Storage Battery Co.*[57] is perhaps the strongest case in support of the procedural statute. In this case, the Electric Storage Battery Company brought suit on a promissory note for $10,000 which had been given by the Wiley Electric Company for the purchase of batteries for resale. The Electric Storage Battery Company had previously been authorized to do business within the state, but had failed to comply with the procedural statute which had been enacted after that authorization. The court held that since the corporation had previously been authorized to do business in this state and had continued to transact the same business that it had been authorized to do, that it would come within the meaning of "doing business" as used in the statute and would not be allowed to maintain an action in the courts of this state.[58]

In *Marx & Bensdorf, Inc. v. First Joint Stock Land Bank*[59] the court held that the maintenance of headquarters in a hotel at regular intervals

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[55]Wiley Electric Co. v. Electric Storage Battery Co., 167 Miss. 842, 147 So. 773 (1933).

[56]Peterman Construction & Supply Co. v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930). For views of other jurisdictions as to the effect of subsequent compliance with the statute where a contract was made void by the expressed provisions of the statute or under the construction placed upon it by the courts in the particular jurisdiction, set *In re* Conecuh Pine Lumber Co., 180 Fed. 249 (D. C. Ala. 1910) (construing Alabama statute); J. Walter Thompson Co. v. Whitehead's, 185 Ill. 454, 56 N.E. 1106 (1900); Hayes v. West Virginia Oil Co., 183 Ky. 622, 210 S.W. 174 (1919); M. A. Kelly Broom Co. v. Missouri Fidelity Co., 195 Mo. App. 305, 191 S.W. 1128 (1917); Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S.E. 404 (1899); American Copying Co. v. Eureka Bazaar, 20 S. D. 526, 108 N.W. 15 (1906).

[57]167 Miss. 842, 147 So. 773 (1933).

[58]The language used seems to indicate that the court would apply this statute to any cause of action, regardless of whether it arose within the state or not. However, it is to be noted that in this case such language is merely *dictum* since the cause of action arose from transactions within the state.

[59]178 Miss. 345, 173 So. 297 (1937). But compare Morrison v. Guaranty Mortgage & Trust Co., 199 So. 110 (Miss. 1940), in which the same nature of acts were transacted, but the court held that they would not constitute "doing business" since they were interstate transactions, and the statute is applicable only to corporations doing intrastate business.

for three or four days during which time an agent effected sales of real estate, which was the regular function of the brokerage company, constituted "doing business" within the purview of the procedural statute; and that in the absence of compliance with this statute, the corporation could not maintain an action in the courts of this state for the failure of the defendant corporation to pay the brokerage commission. It is to be noted that this case necessarily comes within the purview of the procedural statute since the contract between the parties was entered into in another state and would therefore not come within the terms of the penal statute.

In *Case v. Mills Novelty Co.*[60] there was involved an action growing out of the sale of an ice cream dispenser with a service agreement attached. In order to prevent recovery upon the contract in support of the defendant's contentions, it was necessary that there be sufficient acts to bring the transaction within the purview of the penal statute. Proceeding upon the assumption that this statute could apply only to intrastate transactions,[61] the court held that the servicing of the dispenser after its sale in interstate commerce would be a sufficient "doing business" in this state to give the transaction an intrastate classification and thus bring it within the purview of the penal statute and render it void.[62]

By way of recapitulation, it should be noted that in applying these statutes the court has not seen fit to attempt to lay down any definite test to be used in determining whether the corporation is "doing business" within the meaning of the particular statute in question or not, but has stated that it would decide each case upon the facts of that particular case. It has been noted in surveying these Mississippi cases that the court has not indicated whether in a particular case it considered itself limited by the wording of the statute applicable or by the constitutional limitations placed upon the state courts in these matters by the United States Supreme Court. It seems that the court has stayed well within the constitutional limitations in its holdings regarding "doing business."[63]

J. Louis Alford.

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[60]193 So. 625, 126 A.L.R. 1102 (Miss. 1940).

[61]Compare this decision with the cases cited in note 33 *supra* in which it was shown that a foreign corporation could be "doing business" within the meaning of the process and jurisdictional statutes even though such business was interstate.

[62]"The servicing of this ice cream dispenser was purely a local transaction, not incidental to or necessary for the formation of the sales contract, and was subject wholly to the supervision and control of the state." 193 So. at 626. But compare Harleston v. West Louisiana Bank, 129 Miss. 111, 91 So. 423 (1922) in which it was held that the purchase of mortgages at foreclosure sale, their lease and sublease, was not sufficient "doing business" to bring it within the purview of the statute. The court seemed to base its decision upon the fact that their purpose in purchasing, leasing and subleasing the property was solely in view of protecting their indebtedness. Would not the same reasoning apply where the vendor of the ice cream dispencer was merely servicing the dispenser so as to keep it in good order and "protect their investment?"

[63]See HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) *passim;* 8 THOMPSON, CORPORATIONS (3d ed. 1927) c. 184, p. 802; 23 AM. JUR. 239, § 268; 14A C.J. 1248, § 3949.

THE RECENT MISSISSIPPI STATUTE CONFERRING JURISDICTION OVER NON-RESIDENT INDIVIDUALS AND PARTNERSHIPS

Prior to 1940 the Mississippi courts could exercise jurisdiction only over those persons who could be personally served with process within the state, foreign corporations doing business in the state,[1] and nonresident motorists.[2] But in that year, the state legislature passed an act (Chapter 246, Mississippi Laws of 1940) which will involve an unprecedented enlargement of the class of nonresidents subject to the jurisdiction of the state courts. It extended the class to include any person, partnership or corporation which comes into the state to do any business, or perform any work or service.[3]

The language would seem to contemplate that the nonresident must actually enter the state to do the business or perform the work or service, and would hardly apply to a person who had never entered the state and had merely corresponded with residents of Mississippi relative to business transactions.

It is provided first by the statute that substituted service of process may be had in actions accruing out of the transaction done within the state. The next proviso allows such service upon such nonresident in *any* action accruing in the state.

The language could be construed as meaning that any nonresident who carries on such a transaction within the state appoints the secretary of state as his permanent agent for the service of process in any action which might later accrue against him in this state. This might include actions arising out of that business done within the state and it might also apply to actions arising from subsequent negotiations entirely outside the state which by conflict of laws rules are considered as accruing in Mississippi. While such a construction is possible, it would render the constitutionality of the statute doubtful and for that reason alone the Mississippi Supreme Court may well limit it to actions accruing in the state and arising out of the transactions carried on within the state. In this manner the second provision would be qualified by the first.

It applies to any nonresident who "shall do any business or perform any character of work or service in this state." The addition of the words

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[1] MISS. CODE ANN. (1930) § 4166.

[2] MISS. CODE ANN. (Supp. 1938) §§ 1845, 1846.

[3] The Act is as follows:

"Section 1. All civil actions for the recovery of damages brought against a non-resident of the state of Mississippi may be commenced in the county in which the action accrued. Service of process may be had in any county of the state where the defendant, or any of them, may be found.

"Any non-resident; person, firm, partnership, general or limited, or any corporation not qualified under the constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state, shall, by the doing of such business or the performing of such work or services, be deemed to have appointed the secretary of state, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom

"or perform any character of work or service" indicates that the intention was not to limit its application to nonresidents who could be classified as "doing business" within the judicial definition of that term,[4] but to include all nonresidents who engage in a single transaction within the state.

Under its terms the cause of action must accrue in this state and the venue is placed in the county where the cause accrued. In tort actions the cause accrues at the place where the act or omission claimed to be the cause of the damage took place.[5] In actions *ex contractu* the cause of action accrues at the place where performance should have been rendered.[6] This apparently has the effect of making all actions arising out of any business transacted in Mississippi triable in the state courts.

This is one step further in the ever broadening scope of the term *jurisdiction*.[7] Originally it was limited to persons who could be person-

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process may be served in any action, accrued or accruing from the doing of such business or the performing of such work or service, or as an incident thereto by any such non-resident, or his, their or its agent, servant or employee. The doing of such business or the engaging in any such work or service in this state shall be deemed a signification of such non-resident's agreement, and equivalent to an appointment by, such non-resident of the secretary of state of the state of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident upon whom may be served all lawful process in any action or proceeding against any such non-resident for any cause of action which has accrued or may accrue in this state.

"Section 2. Service of any process herein provided for to be made upon the secretary of state shall be made by the sheriff of Hinds county, such sheriff to be entitled to the same fee for service of such process and return thereof as in other cases and shall be paid in advance before such sheriff shall be required to act. Two copies of any summons shall be served on the secretary of state, who shall preserve one copy as a record of his office and the other shall be mailed to the defendant. The summons shall show the address of the defendant. The clerk of the court in which the proceeding is filed shall immediately, upon the filing of the declaration or bill of complaint, send by registered mail, postage prepaid, a true copy of the same to the non-resident defendant. An affidavit of such mailing, together with the registry receipt, shall be filed with the court as a record in the case. The service of process as herein provided shall be of the same force and effect as if such non-resident had been personally served within the state of Mississippi.

"Section 3. The court in which such cause of action is pending may order such continuance or continuances as may be necessary to afford such non-resident reasonable opportunity to defend the action, and no action shall be deemed triable until after thirty (30) days from date of service of process upon the secretary of state. The fee required to be paid to the sheriff of Hinds county shall be taxed as other costs. The secretary of state shall keep a record of all process served upon him, which record will show the day, the hour, and the manner of service thereof.

"Section 4. The provisions of this act shall not apply to any foreign corporation that has qualified under the constitution and laws of this state as to doing business herein and has designated, and has and is maintaining at the commencement of an action against it, an authorized agent or agents residing in this state upon whom process may be had."

[4]See Note, *When is a Foreign Corporation "Doing Business" in Mississippi?*, this issue, page 548 *supra*.

[5]2 BEALE, CONFLICT OF LAWS (1935) 1288.

[6]2 BEALE, CONFLICT OF LAWS (1935) 1272.

[7]For a good discussion of the history of "jurisdiction" in the United States and in foreign countries, see Beale, *The Jurisdiction of Courts Over Foreigners* (1913) 26 HARV. L. REV. 193, 283.

ally served with process within the state. That concept was extended to include foreign corporations which do business in the state.[8] Jurisdiction may be obtained over such corporations by serving process upon the secretary of state or upon an agent of the corporation.[9]

This result was reached by the reasoning that, since a corporation is not a "citizen" within the meaning of the Privileges and Immunities clause of the Federal Constitution,[10] the state may in general exclude a foreign corporation from doing business within the state.[11] With the power to exclude, then, the state has the power to prescribe reasonable[12] conditions precedent to its entering—and one of those conditions may be consent to service of process.[13] Statutes may require the filing of express consent, or they may provide that doing business in itself implies consent.[14] While the language in such cases is ordinarily in terms of consent, that is not the true basis for the holdings, as was recognized in *Smolik v. Philadelphia & Reading Coal & Iron Co.*[15] "The Court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent." Thus, the implication of consent is often a mere expedient fiction to explain the assumption of jurisdiction.

Another established inroad upon the limited concept of jurisdiction has been made by the nonresident motorist statutes.[16] In *Kane v. New Jersey*,[17] a statute requiring actual appointment of the secretary of state as the agent of the nonresident for the service of process, prior to using

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[8]The jurisdiction of a state over foreign corporations is discussed in Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory* (1917) 30 HARV. L. REV. 676; Farrier, *Jurisdiction Over Foreign Corporations* (1933) 17 MINN. L. REV. 270; Fead, *Jurisdiction Over Foreign Corporations* (1926) 24 MICH. L. REV. 633; Rothschild, *Jurisdiction of Foreign Corporations in Personam* (1930) 17 VA. L. REV. 129; Stimson, *Jurisdiction Over Foreign Corporations* (1933) 18 ST. LOUIS L. REV. 195.

[9]MISS. CODE ANN. (1930) §§ 4140, 4163, 4167.

[10]Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (U. S. 1868).

[11]Railway Express Co. v. Virginia, 282 U. S. 440, 51 Sup. Ct. 201, 75 L. ed. 450 (1931); Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432 (1898); Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650 (1888); Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (U. S. 1868).

[12]Under the power to exclude, the state may not impose arbitrary conditions which are unreasonable. For a good discussion of the origin and development of the doctrine of unconstitutional limitations see Merill, *Unconstitutional Limitations* (1929) 77 U. OF PA. L. REV. 879.

[13]Lafayette Insurance Co. v. French, 18 How. 404, 15 L. ed. 451 (U. S. 1855).

[14]Simon v. Southern Ry., 236 U. S. 115, 53 Sup. Ct. 255, 59 L. ed. 492 (1915); Old Wayne Assurance Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345 (1907).

[15]222 Fed. 148, 151 (S.D.N.Y. 1915).

[16]See 1 BEALE, CONFLICT OF LAWS (1935) 359; GOODRICH, CONFLICT OF LAWS (1927) 142-144; STUMBERG, CONFLICT OF LAWS (1937) 92-96; Culp, *Process in Actions Against Nonresident Motorists* (1934) 32 MICH. L. REV. 325; Scott, *Jurisdiction Over Nonresident Motorists* (1926) 39 HARV. L. REV. 563.

[17]242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916).

the state's highways, was held valid. The court went even further in *Hess v. Pawloski*[18] and held valid a statute making the act of entering a state amount to an appointment of the secretary of state as agent of the nonresident motorist for the service of process.[19]

In the earlier case of *Flexner v. Farson*[20] it was sought to gain jurisdiction over a nonresident who had conducted business in Kentucky through an agent, by constructive service on the agent, through analogy to the jurisdiction exercised by the state courts over corporations. The court distinguished an individual from a corporation on the ground that the corporation could be excluded from the state while the individual could not—and thereby the analogy failed. The implication from this case would seem to be that the test of jurisdiction is whether the state may exclude the defendant involved and thus whether it could establish this obligation as a condition to letting him in.

But from numerous other cases we know that the power of exclusion is not the true test.[21] The state may not exclude the nonresident motorist, but its right to subject him to the jurisdiction of its courts has been upheld.[22] The state does not have the power to exclude a foreign corporation which is engaged in interstate commerce;[23] yet, despite this fact, the state may subject such corporation to its jurisdiction by requiring the appointment of an agent for the service of process.[24] Thus, a basis for jurisdiction may be established which will contradict the implication of the *Flexner* case, and the holding can probably be limited to its particular facts.

This, in effect, is what was done in *H. L. Doherty & Co. v. Goodman,*[25] where the United States Supreme Court distinguished the *Flexner* case because the person served there had ceased to be the agent of the defendant, and upheld substituted service of process upon the agent of a nonresident individual engaged in selling securities in the state, under an Iowa statute.

The term *jurisdiction,* then, has been extended to include foreign corporations under the power of exclusion and reasonable regulation, and to

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[18]274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927).

[19]The Mississippi nonresident motorist statute is of this type. MISS. CODE ANN. (Supp. 1938) §§ 1845, 1846. In Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 446, 57 A.L.R. 1230 (1928), the Supreme Court ruled that if such a statute is to be valid, it must require the public official upon whom process is served to send notice to the defendant.

[20]248 U. S. 289, 39 Sup. Ct. 97, 63 L. ed. 250 (1918).

[21]For a discussion of the foundation of jurisdiction, see Ross, *The Shifting Basis of Jurisdiction* (1933) 17 MINN. L. REV. 146.

[22]Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927); Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916).

[23]International Textbook Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. ed. 678 (1910).

[24]International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. ed. 1479 (1914).

[25]294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935).

include nonresident individuals who drive automobiles in the state, or who sell securities in the state.[26] The driving of automobiles is extremely dangerous to the personal safety of the residents, and regulation of nonresident individuals in that regard is upheld on that ground.[27] The sale of securities involves such a great danger of fraud that it requires strict regulation, and so the exercise of jurisdiction over nonresident individuals who engage in that business is upheld on somewhat the same ground—actual protection of the resident from peculiar types of danger.[28] These holdings are as far as the court has yet gone, and are hardly sufficient in themselves to uphold a statute as broad as Chapter 246. They may, however, indicate that the Supreme Court is now ready to adopt a general principle to the effect that a state may exercise jurisdiction over the doing of other types of business in the state, in which case Chapter 246 would be upheld.[29]

One ground often given for exercising jurisdiction over nonresident individuals is the exercise of the state's police power. In the nonresident motorist cases, the police power of the state is exercised to protect the personal safety of the citizens. But the police power is not confined to regulations of health, morals, and safety. It affects economic as well as social conditions. "It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health."[30] The protection of citizens from the wrongful actions of nonresidents within the state, the purpose of Chapter 246, would seem to fall within the scope of the police power.

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[26]See Barry, *Jurisdiction Over Nonresidents* (1927) 13 VA. L. REV. 175; Dodd, *Jurisdiction in Personal Actions* (1929) 23 ILL. L. REV. 427; Keasbey, *Jurisdiction Over Nonresidents in Personal Actions* (1905) 5 COL. L. REV. 436; Note (1928) 13 CORN. L. Q. 606.

[27]Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927).

[28]The danger of fraud in the sale of securities is discussed in Merrick v. N. W. Halsey Co., 242 U. S. 568, 37 Sup. Ct. 227, 61 L. ed. 498 (1917). The court there holds that the legislature may deal drastically with such business and the courts will not interfere unless its laws are palpably arbitrary. The court in the *Goodman* case laid much weight on the fact that the Iowa legislature had placed special regulations upon the sale of securities in the state. General recognition of the danger of security selling is found in the prevalence of "Blue Sky" laws.

[29]This problem is considered in 1 BEALE, CONFLICT OF LAWS (1935) 361-364; GOODRICH, CONFLICT OF LAWS (1927) 144-146; STUMBERG, CONFLICT OF LAWS (1937) 92-95; Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory* (1917) 30 HARV. L. REV. 676; Culp, *Process in Actions Against Nonresidents Doing Business Within a State* (1934) 32 MICH. L. REV. 909; Daum, *The Transaction of Business Within a State by a Nonresident as a Foundation for Jurisdiction* (1934) 19 IOWA L. REV. 421; Scott, *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 HARV. L. REV. 871; Notes (1932) 46 HARV. L. REV. 153, (1933) 18 IOWA L. REV. 257, (1932) 18 VA. L. REV. 896.

[30]See Sligh v. Kirkwood, 237 U. S. 52, 59, 35 Sup. Ct. 501, 59 L. ed. 835, 838 (1915). See also Eubank v. Richmond, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. ed. 156 (1912); Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed. 112 (1911); Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499 (1907); Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596 (1906); Central Loan & Trust Co. v. Campbell, 173 U. S. 84, 19 Sup. Ct. 346, 43 L. ed. 623 (1899).

The protection of business and economic interests of residents would seem to warrant the acquisition of some control over the activities of nonresidents who do business in the state, on the same ground as the protection of personal safety warrants control over nonresident motorists. In the nonresident motorist cases, it is not the personal presence of the defendant within the state which is the basis for service, but the fact that the protection of the safety of the residents demands the approval of this type of service of process and the courts concur in this demand.[31] The consent of the individual is not necessary. The demands would seem to be strong also in the case of actions against nonresident persons who have defrauded residents in the course of business transactions carried on in the state, and certainly the reasons for allowing substituted service upon a nonresident wrongdoer in business transactions are just as practical as the reasons for allowing such service against a nonresident motorist for personal injuries.

Other cases indicate that the foundation for such holdings is not measured by the reasonableness of the exercise of the police power, but is simply a question of whether such assumption of jurisdiction affords due process of law.[32]

Whatever may be the basis, a broad statement of the requirements for jurisdiction of a state over nonresident individuals may be expressed as the existence of a relationship between the state of the forum, and the defendant by which he placed himself under obligations to obey the judgment of the courts of the state.

Under this principle, the validity of Chapter 246 could be upheld. The holding in *H. L. Doherty & Co. v. Goodman*[33] is not broad enough to cover this statute specifically. The statute involved there applies only to persons who maintain an office or agency in the state, while Chapter 246 applies to any nonresident who does any business within the state. The Iowa statute contemplates the doing of a series of transactions, while under the Mississippi statute one business transaction is sufficient. This would not be a serious objection, however, since, for the purposes of jurisdiction, the only transaction with which the court is concerned is the one out of which the action arose. The Iowa statute provides that process may be served on the agent, while Chapter 246 allows service on the secretary of state. Both are forms of substituted service, and both are reasonably certain to convey actual notice to the defendant.

Chapter 246 applies to all types of business or work performed in the state. The language of the Court in the *Goodman* case apparently limits the holding of that case to the sale of securities, but it is possible that this doctrine may be expanded to apply to other types of business. Through

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[31]Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927); Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916)

[32]Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927); Davidson v. H. L. Doherty & Co., 214 Iowa 739, 241 N.W. 700, 91 A.L.R. 1308 (1932).

[33]294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935).

these considerations it is possible to uphold the validity of Chapter 246 under the holding of the court in the *Goodman* case.

The justice and sound reasons of policy behind such a holding are substantial. To hold otherwise would be to compel the resident to incur the financial hardship and inconvenience of seeking the defendant out in his own state and bringing suit there. The reasoning followed by the United States Supreme Court in allowing local suits against foreign corporations is equally applicable here: "In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character both at law and equity, there could be no relief. The result would be, to a large extent, immunity from legal responsibility."[34]

If such service is permitted, on the other hand, the resident may bring his suit at the place where the transaction occurred. The defendant is not required to come into Mississippi to do business, and if he does go out of his way to do business here, then he may logically be required to return here to defend any suit which may arise out of that business. In all suits between citizens of different states, one of those persons must bear the expense of travelling outside his state to take part in the suit. In cases arising out of business done in a state, the person who goes out of his way to cause the damage should be the one who is required to go out of his way to defend a suit arising out of it, rather than the person who has stayed at home and merely traded with a nonresident.

A citizen who does business in the state is subject to suit within the state upon any business he carries on there. The nonresident who enters a state to do business receives the protection of that state's laws, and has access to all the facilities of that state's courts for the enforcement of his rights out of that business done within the state, and, in that regard, is on an equal footing with the resident. To allow him to escape all practical responsibility for his actions would be to discriminate against domestic enterprise. But to uphold Chapter 246 would be to make the nonresident who does business in Mississippi similarly amenable to process in actions arising out of that local business, in return for the privilege of doing business in, and the protection of the laws of, that state. The ultimate effect would be to place nonresidents on an equal footing with residents, with regard to responsibility for actions within the state, which is the true purpose of the Privileges and Immunities clause.[35]

Assuming then, that the Supreme Court of the United States will decide that the Mississippi court may assert jurisdiction, we must still consider whether this method of asserting it violates any of the privileges or rights guaranteed to the nonresident defendant by the Federal Constitution. The proper jurisdiction of the court is one of the requirements of the Due Process clause. Other requirements are notice and an opportunity to defend. If the method of service of process is such as is reason-

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[34]Baltimore & Ohio R.R. v. Harris, 12 Wall. 65, 84, 20 L. ed. 354, 359 (U. S. 1870).

[35]Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (U. S. 1868).

ably calculated to give notice, then it fulfills the requirements of notice under the Due Process clause.[36] If the statute requires the public official to send notice by mail to the nonresident defendant, a reasonable method of affording notice is provided.[37]

Chapter 246 provides that all such process served on the secretary of state shall show the address of the defendant, and that the secretary of state shall mail a copy of it to the defendant. It is provided further that the clerk of the court in which the suit is filed shall send by registered mail a copy of the declaration or bill of complaint to the defendant, and that an affidavit of such mailing, together with the registry receipt, shall be filed as a record in the case. These provisions seem to fulfill all the requirements of notice under the Due Process clause.

The nonresident under Chapter 246 has every reasonable opportunity to defend the suit. He has a good opportunity to investigate the case and gather his witnesses, since the venue of the action is the place where the cause of action accrued. He is given all the time which may reasonably be necessary to prepare his case considering all the circumstances of his individual case. The statute provides that the court in which the suit is pending may order such continuances as may be necessary to afford the nonresident reasonable opportunity to defend the action, and no action is triable until after thirty days from the date of service of process upon the secretary of state.

Other limitations under which its validity might be questioned are to be found in the Priviliges and Immunities and the Equal Protection clauses of the Constitution. The purpose of the Priviliges and Immunities clause is to guard against unjust discrimination by a state either in favor of its own citizens or against citizens of other states.[38] But a state may enact a statute applicable solely to nonresidents which tends to put them on the same footing with residents.[39] Does Mississippi, under Chapter 246, unfairly discriminate against nonresidents?

The provisions of this statute are expressly limited to nonresidents; and to determine what regulations of this nature are placed upon residents

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[36]H. L. Doherty & Co. v. Goodman, 294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935); Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 446, 57 A.L.R. 1230 (1928). See Burdick, *Service as a Requirement of Due Process in Actions in Personam* (1922) 20 MICH. L. REV. 422.

[37]Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 446, 57 A.L.R. 1230 (1928); Town of Hinckley v. Kettle River R.R., 70 Min. 105, 72 N.W. 835 (1897); American Railway Express Co. v. Fleischmann Morris Co., 149 Va. 200, 141 S.E. 253 (1928). The question of substituted service of process on nonresidents is discussed in Hinton, *Substituted Service on Nonresidents* (1925) 20 ILL. L. REV. 1; Notes (1941) 10 FORDHAM L. REV. 126, (1939) 25 WASH. U. L. Q. 90.

[38]Paul v. Virginia, 8 Wall. 168. 19 L. ed. 357 (U. S. 1868). See McGovney, *Privileges or Immunities—Fourteenth Amendment* (1918) 4 IOWA L. BULL. 219; Meyers, *Privileges and Immunities of Citizens in the Several States* (1903) 1 MICH. L. REV. 286; Morris, *What are the Privileges and Immunities of Citizens of the United States?* (1921) 28 W. VA. L. Q. 38.

[39]Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927); Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916).

for the purpose of comparing the relative provisions for the two, we must consider the statute law of Mississippi as a whole. In actions for damages against residents of Mississippi, the venue of the action is that place in the state which is most advantageous to the defendant, namely the county of his residence.[40] Under Chapter 246, in actions for damages arising out of business done in Mississippi, against nonresidents, the venue of the action is also that place in the state which is most advantageous to the defendant. In prescribing a universal rule which would fix the suit at the place in the state which would most often be most favorable to the defendant, the legislature selected a place with which the nonresident has had some actual and voluntary contact through activity there. The logical place was the county where the cause of action accrued.[41]

Thus it will be seen that there is given to the defendant the greatest advantage which is reasonable under the circumstances in each case, and the difference in provisions for the two is not an arbitrary discrimination, but is made necessary by the difference in circumstances surrounding them.

The next consideration under this section is the difference in the method of serving process on residents and nonresidents. A resident of the state must be served personally by handing him a copy of the process if possible. If that is impossible he may be served by a substituted service by leaving a copy with a member of his family over sixteen years of age and willing to receive it at his usual place of abode, or if both the foregoing are impossible, he may be served by posting a copy of the process on a door of his usual place of abode.[42] Both of the latter are considered the equivalent of personal service.[43] Thus the resident may not demand personal service in all cases, but may be served constructively in a manner which makes it only probable that he will get actual notice. He is served in the best manner possible under the circumstances.

Under Chapter 246 the secretary of state is required to mail a copy of the summons to the defendant, and the clerk of the court in which the case is filed is required to mail a copy of the declaration or bill of

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[40]Miss. Code Ann. (1930) § 495.

[41]Some of the nonresidents covered by this statute will be persons or partnerships which conduct a continuous business in the state through an agent, and in many cases through an established place of business. For this particular class the venue could have been fixed at a more desirable place—where that agent or place of business is located. But we must consider also that residents of surrounding states could most easily defend a suit in the county in Mississippi which is right across the state line from their residence. The impracticability of establishing a different venue for each of the conceivable classes of nonresidents is obvious, and it appears that this statute provides the most satisfactory medium. As a matter of practice most causes of action against a nonresident who maintains an agency here will accrue where that agency is situated, and, furthermore, with the residents of surrounding states, much of their business will be conducted in the counties of Mississippi which are nearest the home of the nonresident and the cause will accrue there.

[42]Miss. Code Ann. (1930) § 2978.

[43]Earle v. McViegh, 91 U. S. 503, 23 L. ed. 398 (1875); Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. ed. 70 (U. S. 1873).

complaint to the defendant by registered mail, and an affidavit of mailing, together with a registry receipt, must be filed as a record in the case.[44] Thus, the nonresident also is served in the best manner possible under the circumstances. This method of serving process has been upheld in the nonresident motorist cases as providing a reasonable method of affording notice.[45]

From these considerations, it would appear that the nonresident would be as likely to get actual notice of the pendency of proceedings against him as the resident. Chapter 246 certainly would not have the harsh results which may often attend the method of leaving a copy of the process at a person's home, regardless of his whereabouts—a rule adopted for public convenience and having no more cogent reasons than the rule here. As long as the nonresident is as likely to get actual notice as the resident, it would seem that he could demand no more under the Privileges and Immunities clause simply because a slightly different method of conveying that notice is provided.

The difference in the methods of serving process on residents and nonresidents, thus, is not an arbitrary discrimination, but is made necessary by the difference in their positions, as is the case in the different venue provided for the two.

Assuming, however, that there is some discrimination against nonresidents in the venue of the action and in the methods of serving process, that discrimination would hardly be considered a violation of the Privileges and Immunities or the Equal Protection clause. The United States Supreme Court, in *Ballard v. Hunter*,[46] held that discrimination between nonresidents and residents in the mode of service of process was legitimate. The Equal Protection clause does not stand in the way since it assures equality of protection only to those similarly situated.[47] Neither of these clauses was designed to obtain more favorable treatment for the nonresident. There is a wide variance in the circumstances surrounding the resident and the nonresident, and the problems involved in suing them are proportionately different. A state may pass any statute which tends to overcome this difference in position between the two and put them on the

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[44]Statutes allowing any form of substituted service are construed strictly, and only a strict compliance with their terms will suffice to fulfill the process requirement. Chapter 246 provides that the process served on the secretary of state must contain the address of the defendant. Any process which contained no address, or an incorrect address, and resulted in the defendant's failure to receive actual notice, would probably be held not to fulfill the requirements of the statute, and no valid judgment could be based thereon. If the process does contain the correct address and the secretary of state mails the process to that address, the only element involved in the probability that the defendant will receive actual notice is the efficiency of the Post Office Department.

[45]Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927). See also, Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 446, 57 A.L.R. 1230 (1928).

[46]204 U. S. 241, 27 Sup. Ct. 261, 51 L. ed. 461 (1907).

[47]Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. ed. 369 (1911); Southern Ry. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. ed. 536 (1910); Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923 (1885).

same footing.[48] There is a definite discrimination against nonresidents in the statutes which require them to give bond for costs before being allowed to defend actions in the local courts, but those statutes have been upheld as being reasonable and not hostile to the fundamental rights of the nonresident.[49] It is only the fundamental rights which are protected by this constitutional provision.[50]

No unjust discrimination is involved if the difference in the means adopted to put all business enterprises operating in the state upon an equal footing bears a fair relation to the difference in the conditions attending each.[51]

The provisions of Chapter 246 should qualify under this rule. Apart from such a statute the nonresident enjoys a practical exemption from suit not enjoyed by the resident. While the difference in circumstances requires a difference in venue and the method of serving process, the statute gives the nonresident every reasonable consideration in both, and results in placing him on an equality with the resident as to actions growing out of his business within the state.

Even though it be conceded that there is no unconstitutional discrimination between residents and nonresidents, there still remains the question whether such discrimination exists between two classes of nonresidents, individuals and foreign corporations.

Under the Mississippi Law a foreign corporation may appoint the secretary of state or a resident agent for the service of process.[52] Chapter 246 does not expressly give the alternative of appointing a resident agent to the nonresident individual or partnership, and this may be a denial to it of the equal protection of the law.

Statutes must be construed, so far as concerns the particular question at issue, as nearly as may be in accordance with the general system of which it forms a part.[53] Mississippi has a general system of legislation applicable to nonresidents who transact business in the state. The foreign

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[48]Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (U. S. 1868). In Kane v. New Jersey, 242 U. S. 160, 167, 37 Sup. Ct. 30, 61 L. ed. 222, 227 (1916), Mr. Justice Brandeis, speaking of a New Jersey statute requiring nonresident motorists to file consent to service of process on the secretary of state prior to entering, said, "It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners."

[49]Ownbey v. Morgan, 256 U. S. 94, 41 Sup. Ct. 433, 65 L. ed. 837 (1921); Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432 (1898).

[50]Maxwell v. Bugbee, 250 U. S. 525, 40 Sup. Ct. 2, 63 L. ed. 1124 (1919)

[51]Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923 (1885). The court there holds that if a difference in treatment of groups is based upon and bears a relation to a substantial difference in the conditions surrounding each, then it does not violate the Fourteenth Amendment.

[52]Miss. Code Ann. (1930) § 4140.

[53]Simpson County v. Burkett, 178 Miss. 44, 172 So. 329 (1937). See Black, Interpretation of Laws (2d ed. 1911) § 104; Crawford, Statutory Construction (1940) §§ 231, 232.

corporation statutes[54] are a part of this, and Chapter 246 forms another part. By construing the statutes *in pari materia,* Chapter 246 might impliedly allow the appointment of a resident agent by the nonresident individual, partnership, or corporation[55] and in the event of its failure to do this, it would be deemed to have appointed the secretary of state.

If the court does see fit so to construe the statute, there is undoubtedly a discrimination between the foreign corporation and the nonresident individual. Does this discrimination amount to a denial to the individual of the equal protection of the law?

The Equal Protection clause assures equality of right for all persons in the same circumstances.[56] The nonresident individual and the foreign corporation are in the same classification in this respect. They are both nonresident persons conducting business within the state, and are entitled to equal protection of the law in Mississippi.

The Equal Protection clause guarantees an equality of right, but not necessarily an identity of right.[57] It assures "equal protection" but would hardly condemn a statute which gives two persons a slightly different treatment, if no greater burden or privilege is given to one than the other, and they reach the same result. Also, a discrimination merely technical and in no sense substantial or unjust does not render a statute void.[58]

Under these considerations of the Equal Protection clause, then, it would be possible to argue that, while the nonresident individual does not receive an identity of right with the foreign corporation, he receives an equality of right. The fundamental issue involved is the receipt of notice of the action by the defendant. While a different medium is provided for conveying that notice it would seem that the individual would be as likely to receive actual notice as the corporation. On the one hand, the exigencies of business make it probable that the resident agent will transmit notice to his principal, while, on the other hand, the exigencies of public duty and politics, plus the express requirement of the statute, make it practically certain that the secretary of state will transmit notice to the nonresident individual.

Thus it would appear that the assurance of actual notice given to the individual is equal to the assurance given to the corporation, and the differ-

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[54]MISS. CODE ANN. (1930) §§ 4140-4167.

[55]Board of Supervisors of Attala County v. Illinois Cent. R.R., 186 Miss. 294, 190 So. 241 (1939); Jackson County v. Meaut, 185 Miss. 235, 189 So. 819 (1939); First National Bank & Trust Co. v. Landau, 183 Miss. 651, 184 So. 618 (1938); State, *ex rel.* Attorney General v. School Board of Quitman County, 181 Miss. 818, 181 So. 313 (1938); Simpson County v. Burkett, 178 Miss. 44, 172 So. 329 (1937).

[56]South Carolina v. McMaster, 237 U. S. 63, 35 Sup. Ct. 504, 59 L. ed. 839 (1915); Denver v. New York Trust Co., 229 U. S. 123, 33 Sup. Ct. 657, 57 L. ed. 1101 (1913); Yazoo & Miv. R.R. v. Jackson Vinegar Co., 226 U. S. 217, 33 Sup. Ct. 40, 57 L. ed. 193 (1912); Toyota v. Hawaii, 226 U. S. 184, 33 Sup. Ct. 47, 57 L. ed. 180 (1912).

[57]Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1891).

[58]Dolley v. Abilene National Bank, 179 Fed. 461, 102 C.C.A. 607 (8th Cir. 1910), *aff'd,* 228 U. S. 1, 33 Sup. Ct. 409, 57 L. ed. 707 (1913).

ence in the method of granting that assurance would not deny equality of protection of the law. The discrimination would seem to be merely technical, and not substantial or unjust. It is unfortunate, however, that the legislature did not expressly provide in Chapter 246 that a nonresident individual or partnership should have an alternative of appointing a resident agent of its own choice for the service of process.

Marvin Williams

DAMAGES UNDER THE MISSISSIPPI WRONGFUL DEATH STATUTE*

In General

At common law before the enactment of Lord Campbell's Act in England in 1846 if a person sustained bodily injury by the wrongful act of another and died before recovering judgment against the wrongdoer, the cause of action was abated upon the death of the injured party.[1] This common law doctrine has been abrogated in all of the forty-eight states in this union by statutes based upon the historic Lord Campbell's Act with some variations. The statutes are of two general types: The first allows the administrator of the deceased to sue upon the claim which the deceased could have maintained in his lifetime, or to revive and pursue to judgment any suit for the injury which had actually been brought by the deceased; and the second confers upon the surviving relatives or upon the administrator of the estate a new cause of action for the death if the death resulted from the injury inflicted by the defendant. The first are called Survival Statutes, and the second are called the Death Injury Acts. The essential difference between the two types of statutes is that the first allows recovery for only those damages to the decedent, for which he himself might have recovered had he continued to live, thus only continuing his right of action as an asset of his estate; while the second creates a new cause of action for the injuries sustained by the statutory beneficiaries themselves as a result of the death.[2] But in Mississippi both of these two actions have been incorporated into one statute allowing damages to be recovered by the administrator, suing for the benefit of the statutory beneficiaries, or by the beneficiaries themselves, suing in their own name for their own benefit, for both the damages to the decedent as such and damages resulting to the statutory beneficiaries from the subsequent death of the decedent.[3]

Perhaps the most difficult problems arising out of the statute have arisen under the question of damages—that is, what elements or factors

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*Miss. Code Ann. (1930) § 510.

[1]McCormick, Damages (1935) § 93.

[2]*Ibid.* Prosser, Torts (1941) 956. For a distinction between the two types of statutes see Jones, *Civil Liability for Wrongful Death in Iowa* (1925) 10 Iowa L. Rev. 165; Rose, *Foreign Enforcement of Actions for Wrongful Deaths* (1934) 33 Mich. L. Rev. 545.

[3]The code provides that "In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit."

might be taken into consideration by the jury in computing the amount of damages to be recovered by the plaintiff. The position of the court has not been at all stable as to this point, as is evidenced by its wavering and at times contradictory holdings.

In allowing damages for the injury and subsequent death of the decedent, the courts have usually adopted one of two main theories. Under the first theory the loss to the surviving relatives, that is, the deprivation of contributions, services, *etc.*, of the decedent, constitutes the sole criterion by which the damages are measured; while under the second theory the inquiry is as to the loss to the estate, that is, the value of the earnings and savings of the decedent for the rest of his normal expectancy.[4] The confusion in the decisions of the Mississippi court seems to have resulted largely from a failure to distinguish properly between these two main theories of compensation for the wrongful death. Instead of drawing a sharp line of demarcation between these two separate theories, the court has allowed in certain instances damages calculated upon both theories in the same case. Obviously such a method of computation is erroneous in that it allows a pyramiding of damages, giving compensation for loss of gratuities and services, *etc.*, under the first theory and then again making an added allowance for these losses on the loss of earnings theory; for any gratuities must necessarily come from the amount earned by the decedent during his life expectancy in the usual case. This seems to be the pitfall into which the court stumbled in the case of *Cumberland Telephone & Telegraph Co. v. Anderson*[5] when it said that the jury should allow in addition to the single item for which recovery was allowed in the case of *Mobile & Ohio R. R. v. Watley:*[6]

> ". . . such damages as the jury may fairly award as compensation for the physical and mental anguish endured by the child killed between the injury and death, to which must also be added any such gratuities as the evidence may show the mother had a reasonable expectation of receiving before or after majority, and also whatever sum the son might have recovered as the present value of his own expectancy."[7]

The error of the court is apparent. The plaintiffs were allowed to recover for the loss of services up until the age of twenty-one and for the loss of gratuities which the plaintiffs had a reasonable expectation of receiv-

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[4]McCormick, Damages (1935) § 95.

[5]89 Miss. 732, 41 So. 263 (1906).

[6]69 Miss. 145, 13 So. 825 (1891). The court in the *Watley* case said: "Compensation for the injury is to be measured by the value of the pecuniary interest of the father in his child. He is to be compensated for the pecuniary loss sustained, and not otherwise. It is a question of dollars enough to pay for the loss the father has sustained by the death of his child, on the theory of his right to his services during his minority." *Id.* at 151, 13 So. at 826.

[7]89 Miss. 732, 744, 41 So. 263 (1906).

ing,[8] which in this case must necessarily have been made out of the earnings of the decedent during his life expectancy. For this reason the *Anderson* case was strongly criticized in the case of *New Deemer Mfg. Co. v. Alexander*.[9] The decision of the *Anderson* case appears to be simply reactionary from the arbitrary and narrow limits set in the *Watley* case, although the court sought to justify its decision on the ground of a statutory amendment which it said warranted the addition of the new elements of recovery. However, a cursory purview of the statute in effect at the time of the *Watley* decision and the amended statute under which the *Anderson* case was decided will show the inadequacy of such reason for departure from the rule in the earlier case.[10] A more likely reason is that in its effort to break the unreasonably harsh shackles of the *Watley* decision, the court unwittingly fell into the other extreme, which proved to be as unjust to the defendant as the first was to the plaintiff.

Loss of Earnings—Present Value of Life Expectancy of Deceased

Even among those jurisdictions which base their compensable damages upon the theory of damages to the estate, there is a diversity of opinion as to whether damages should be allowed for (1) the present value of the earnings to the deceased during the rest of his life after deducting his individual expenses, (2) the present value of what he would have saved during his normal expectancy, or (3) the present value of his gross earnings calculated upon his expectancy.[11] Whether the Mississippi court will allow damages for the loss of earnings of the decedent in any of the above forms is entirely unsettled and problematical, as will be shown later; but one can be reasonably certain that in case such damages are allowed it will adopt the first view herein denominated.

The first case in this state in which the life expectancy of the decedent, that is, the amount which the decedent would have earned during his normal life expectancy, was considered an element of compensable dam-

[8]In the case of Hines v. Moore, 124 Miss. 500, 87 So. 1 (1921) it was held that an instruction telling the jury that it should find a lump sum for a reasonable compensation for the life expectancy of the deceased, and in addition thereto a reasonable compensation for the value of any services which the deceased would have rendered to his mother before the age of twenty-one, was error, the court saying that the first part of the instruction covered the latter, for the reason that the life expectancy was calculated from the time of the death of the child.

[9]122 Miss. 859, 85 So. 104 (1920).

[10]The statute in effect at the time of the *Watley* decision, MISS. CODE ANN. (1892) § 663, provided that, "The jury may give such damages as may be fair and just with reference to the injury of the parties suing," while the amended statute. Miss. Laws 1898, c. 65, p. 82, under which the *Anderson* case was decided, provided that, "The party suing shall recover such damages as the jury shall assess, taking into consideration all damages of every kind to any and all parties." The only thing added by the amended statute was the right to recover for damages to the decedent in addition to damages to the parties suing, but gratuities and damages for the present value of the life expectancy of the decedent have always been considered by the Mississippi court as damages to the party suing, and these were not allowed by the *Watley* case. The only possible additions that could have been warranted by the amended statute were damages for the pain and suffering of the decedent, and the damages to the estate of the deceased caused by expenditures made for medical attention, *etc.*

[11]McCORMICK, DAMAGES (1935) § 96.

age was *Cumberland Telephone & Telegraph Co. v. Anderson.*[12] Shortly thereafter in *Mississippi Oil Co. v. Smith*[13] the court held that this was a proper element of damages to be assessed by the jury upon being specifically claimed. It will be noted that in neither of these cases did the court say that the amount should be reduced by the amount of the expenses which the decedent would have incurred during his own lifetime, nor that the savings of the decedent from such amount earned constituted the proper basis of recovery; but it unequivocally held that the present value of the life expectancy might be recovered. But in the case of *New Deemer Mfg. Co. v. Alexander*[14] the *Anderson* case was criticized, in addition to other reasons previously noted, because it did not deduct from the amount allowed that such which was necessary for the support of the decedent himself. Also it was held in *Hines v. Green*[15] and *Louisville & Nashville R. R. Co. v. Garnett*[16] that the living expenses of the decedent himself should be deducted from the present value of his life expectancy.

If the present value of the net earnings during the life expectancy of the deceased is made the basis of recovery, it is often of prime importance whether it is to be recovered as damages to the decedent himself or as damages to the beneficiaries. In language, at least, it would appear that in *Cumberland Telephone & Telegraph Co. v. Anderson*[17] the court treated the loss of earnings as a damage to the decedent himself rather than to the next of kin or statutory beneficiaries, the court saying that the plaintiff could recover

" . . . whatever sum the *son* might have recovered as the present value of his life expectancy." (Italics added.)

However, it was expressly held in *Belzoni Hardwood Co. v. Cinquimani*[18] that the present value of the husband's expectancy was not an element of damages to be allowed when the plaintiff based her claim to recovery upon the damage to the decedent alone, omitting any damage to her caused by the subsequent death of her husband. The case of *Yazoo & M. V. R. R. v. Barringer*[19] sets forth what now appears to be the settled rule, holding that in a case where death was instantaneous and the decedent left no relatives within the class designated by statute, no actual damages accrued to the deceased, and the recovery of the personal representative should be limited to nominal damages. The court said:

> " . . . it not only appears that he could not have earned any substantial amount of money had he lived out his life expectancy,

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[12]89 Miss. 732, 41 So. 263 (1906).
[13]95 Miss. 528, 48 So. 735 (1909).
[14]122 Miss. 859, 95 So. 104 (1920).
[15]125 Miss. 476, 87 So. 649 (1921).
[16]129 Miss. 795, 93 So. 241 (1922).
[17]89 Miss. 732, 41 So. 263 (1906).
[18]137 Miss. 32, 102 So. 470 (1924).
[19]138 Miss. 296, 103 So. 86 (1925).

> but if the evidence were to the contrary, no recovery could be had therefor."[20]

Subsequent to those cases holding that the life expectancy of the decedent was not an element of damages *to the deceased himself,* the court has intermittently held that this was not an element for which damages might be recovered at all. The first case holding that the present value of the decedent's life expectancy was not an element of damage to the decedent or the beneficiaries was that of *Gulf Refining Co. v. Miller.*[21] The court held in that case that it was erroneous to instruct the jury that they might find such damages " . . . as will be just, fair and reasonable compensation for the value of the services of Vardaman Hall Miller to his parent, up to the time of majority, which includes all moneys you are reasonably certain that he would have earned up to that time . . . and also whatever sum, if any, the son might have recovered as the present value of his own life expectancy, calculated from his majority. . . ." It is said that the present value of decedent's life expectancy was not an element of damage to the decedent. This statement finds ample support in the authorities cited by the court.[22] But the court then proceeded to say, as if it logically or necessarily followed from this, and citing no authorities for the statement, that:

> "Under the clause of the statute permitting recovery for 'all damages of every kind to any and all parties interested in the suit,' the appellees have the right to recover, not the value of Miller's life expectancy, but the present value of any pecuniary advantage which evidence might have disclosed they had a reasonable expectation of deriving from Miller, had he continued to live."[23]

It is submitted that this holding is unsupported by authority, and that it seems to be bottomed upon an erroneous interpretation of the *Cinquimani*

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[20] *Id.* at 303, 103 So. at 87. But see PROSSER, TORTS (1941) 961, where the rule is announced that damages for loss of earnings are recoverable as damages to the decedent's estate.

[21] 150 Miss. 68, 116 So. 295 (1928).

[22] Yazoo & M. V. R.R. v. Lee, 148 Miss. 809, 114 So. 866 (1928); Yazoo & M. V. R.R. v. Barringer, 138 Miss. 296, 103 So. 86 (1925); Belzoni Hardwood Co. v. Cinquimani, 137 Miss. 32, 102 So. 470 (1924).

[23] 150 Miss. 68, 89, 116 So. 295, 297 (1928). Had the court merely said that the value of the life expectancy of the decedent could not be recovered by the next of kin as damages to the decedent and stopped there, its decision would have been technically correct and in accord with authority; for the instruction asked for whatever sum the *son* might have recovered as the present value of his own life expectancy. But it would seem that a reversal based upon this technical ground would have been unwarranted for the reason that in a case where suit is brought by the beneficiaries for damages to the decedent as well as to the next of kin, it is immaterial whether the life expectancy be recovered as damages to the decedent himself or as damages to the beneficiaries, for the amount allowed for such expectancy would be the same. However, it will be noticed that the reversal was not based upon this ground, but rather upon the ground that the life expectancy was not recoverable at all.

and *Barringer* cases, and *Yazoo & M. V. R. R. v. Lee,*[24] which did not hold that the value of the life expectancy could not be recovered by the beneficiaries, but only held that it could not be recovered as damages *to the decedent himself.*

The indecision and instability of the court on this point is further evidenced by the fact that in June after the *Miller* case was decided in March, the court held that the value of the life expectancy of the deceased might be recovered by the parties suing. In that case the court said:

> "Under the evidence in this case, the only elements of actual damages were the deceased's pain and suffering, and the present net cash value of his life expectancy measured by his earning capacity."[25]

In this case the court did not distinguish or reconcile the recent contradictory holding but in its opinion completely ignored its existence. About three years later the court again reversed itself as to this point when it held in *Natchez Coca-Cola Bottling Co. v. Watson*[26] that the plaintiffs could not recover the present net value of the decedent's life expectancy, but only such amount as the evidence showed they had a reasonable expectation of receiving from the deceased had he continued to live. The court in the *Watson* case states that the contention for the present value of the life expectancy of the decedent is based upon the authority of *Gulf & S. I. R. R. v. Boone,*[27] which has been modified and necessarily overruled by subsequent decisions, the *Boone* case being expressly based upon the authority of *Mississippi Oil Co. v. Smith*[28] and *Cumberland Telephone & Telegraph Co. v. Anderson,*[29] both of which had been criticized and modified in the case of *New Deemer Mfg. Co. v. Alexander.*[30] But the court seemingly failed to note the reason for the criticism of those cases, which was not that the life expectancy of the decedent was made the basis of recovery, but that double recovery was given by allowing gratuities, *etc.,* in addition to the present value of the life expectancy, when the gratuities, *etc.,* must necessarily have been made from it. The court then cites the *Cinquimani* and *Barringer* cases in support of the statement that this was not an element of damage to the decedent; but these cases are not controlling in the situation then at bar, since it does not appear that the plaintiffs were claiming the value of the life expectancy as damage to the decedent himself. The *Miller* case is quoted at some length in support of the contention that the present value of the life expectancy is not an element of damage for which recovery might be had, but it has already been pointed out that this case seems contrary to the authorities, and appears to be based upon a misconception of those cases which preceded it holding that the life expectancy was not an element of damage to the

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[24]148 Miss. 809, 114 So. 866 (1928).
[25]Gulf, M. & N. R.R. v. Graham, 153 Miss. 72, 80, 117 So. 881, 884 (1928).
[26]160 Miss. 173, 133 So. 677 (1931).
[27]120 Miss. 632, 82 So. 335 (1919).
[28]95 Miss. 528, 48 So. 735 (1909).
[29]89 Miss. 732, 41 So. 263 (1906).
[30]122 Miss. 859, 85 So. 104 (1920).

decedent himself. A few years later it was held in *Standard Coffee Co. v. Carr*[31] that an instruction telling the jury that they had a right to consider the present money value of the loss of services and companionship that the husband might have enjoyed and the loss of care and moral training to the children during their minority, was not erroneous as making the life expectancy of the deceased the basis of recovery, thus indicating that had the expectancy been declared as an element of damages, the instruction would have been erroneous. However, in *Avery v. Collins*,[32] decided only a few days before the *Carr* case, the court strongly intimated that the plaintiff might have recovered damages for the life expectancy of the principal beneficiary, the principal beneficiary's normal expectancy being shorter than that of the infant, upon a proper showing of facts. The court in its opinion said:

> "The defendant did request and obtain, under the privilege last mentioned, two cautionary or limiting instructions; one to the effect that the jury should allow nothing for the life expectancy, but the instruction is obscure as to whether it meant the life expectancy of the deceased or whether that of the principal beneficiary. However, the instruction is correct in substance whether it meant the life expectancy of the deceased . . . or whether the life expectancy of the principal beneficiary, the latter for the reason that there was not a word of evidence as to the 'age, and health, constitution,' etc., of any of the beneficiaries. . . ."[33]

Thus it would appear that any opinion as to whether the present value of the net earnings of the decedent during his life expectancy might be taken into consideration in computing damages can be nothing short of a mere conjecture. It is submitted, however, that the expectancy is a proper element of damages for which recovery ought to be allowed, for it is a definite detriment to the decedent's estate, which would have been augmented by his earnings during his normal life expectancy. Nor is such a contention devoid of authority, for it appears that the states are about evenly divided on this question,[34] the better reason appearing to rest on

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[31]171 Miss. 714, 157 So. 685 (1934).

[32]171 Miss. 636, 157 So. 695 (1934).

[33]*Id.* at 641, 157 So. at 698. It seems that the court here was merely following the line of cases holding that the shorter expectancy must control in the allowance of damages, after the life expectancy of the deceased has been compared with that of the beneficiary; and in this case the expectancy of the infant was greater than that of the beneficiary, and hence damages could not be recovered for his expectancy, nor could damages for the life expectancy of the beneficiary be recovered since there was no evidence as to age, health, *etc.*, of the beneficiary by which the life expectancy of such beneficiary could be computed. For a full discussion of this question see page 585 *infra*.

[34]For cases holding that the present value of the life expectancy might be recovered see Allender Co. v. Browning's Adm'x, 242 Ky. 273, 46 S.W.(2d) 116 (1932); Philips' Committee v. Ward's Adm'r, 241 Ky. 25, 43 S.W.(2d) 331 (1931); Gates v. Beebe, 170 Mich. 107, 135 N.W. 934 (1912); Pitman v. Merriman, 80 N. H. 295, 117 Atl. 18, 26 A.L.R. 589 (1922); Rigsbee v. Atlantic C. L. R.R., 190 N. C. 231, 129 S.E. 580 (1925); Turner v. Maxon, 53 R. I. 164, 165 Atl. 372 (1933); Burns v. Brightman, 44 R. I. 316, 117 Atl. 26 (1922).

the side of those courts holding the life expectancy to be an element of compensable damages, and the wording of the Mississippi statute is sufficient to embrace this element within it. Indeed, it would be difficult to phrase a statute more inclusive as to damages.

But it is said that this method of compensation is too speculative and uncertain, for there is always the possibility that the estate might decrease in value rather than increase, or that the decedent might otherwise dispose of it. But it is to be remembered that not to allow recovery for this reason would be to construe this contingency most strongly in favor of the wrongdoer, when all of the presumptions should be in favor of the innocent party. This is especially true when the presumption is that things will continue in their normal course, as it would be in this case. Moreover, it seems that this method is far less speculative than is the method based upon gratuities, *etc.,* which, because of its nature, cannot be ascertained to any reasonable degree of certainty. However, in allowing damages for the present net value of the life expectancy of the deceased, the court should be careful not to allow any overlapping as was done in the *Anderson* case. This would mean that damages allowed for the loss of support and gratuities which must come from the earnings of the decedent must be eliminated; but it is believed that the proposed method is more certain by its nature than the other, and that it more fully compensates for the loss actually sustained by the wrongful conduct of the defendant.

Loss of Services

Loss of services has always been recognized by the court as an element for which damages might be recovered. But in a suit for the loss of services of an infant, the years of service are limited to the years of minority.[35]

It is not necessary that the infant should ever have earned anything before this might be considered by the jury, it being well settled in the United States that substantial damages might be recovered in such cases.[36] In a leading case in this country, suit was brought for the death of a three-year-old child and damages were claimed for the loss of services resulting from the death. In holding such damages recoverable the court said:

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[35]Davis v. McCullers, 126 Miss. 521, 89 So. 158 (1921). Is there any good reason for limiting the recovery for service to the years of minority? Do not the aged parents of a dutiful daughter who has reached her majority but still continues to live with the parents and administer to their needs and comfort suffer because of the deprivation of the services of such child by her wrongful death just as much as if she had still been in her minority? It is said that the parents have no legal claim to the services of the child after the age of minority, but should this be conclusive when they are in fact actually receiving such services, and there is every indication that they will continue? The parents have no legal right to gratuities made by an adult child, but the courts have not hesitated to allow recovery for that reason. Indeed, it is said in PROSSER, TORTS (1941) 965 that the greater number of courts have not so limited it.

[36]TIFFANY, DEATH BY WRONGFUL ACT (1913) § 164.

> "It cannot be said as a matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived."[37]

The general rule in other jurisdictions is to the effect that in such cases testimony as to the value of the services of the child is unnecessary, and the jury may infer the amount of the loss from the proof of the age, sex, and condition in life of the deceased child.[38] But whatever view the courts of other states have taken as to the proof required in these cases, the United States Circuit Court of Appeals in construing the Mississippi statute has held unequivocally that, in the absence of evidence as to the value of the infant's services, no recovery can be had. In the case of *Moser v. Hand*[39] suit was brought by the parents for the death of a three-year-old child, and the court instructed the jury that they should include in the damages awarded, " . . . the present cash value of such services as you think, under the evidence, has been shown that the child might have rendered to the father and mother until he arrived at twenty-one years of age, less such cost and expenses that are necessarily incident to the rearing of the child." In his opinion Judge Walker said:

> "Substantial damages for the loss of a deceased minor's services are not recoverable by the minor's parents in the absence of evidence of the reasonable value of such services. In the absence of any such evidence, the above set out parts of the court's instructions to the jury as to the amount recoverable by the decedent's parents on account of their loss of decedent's services was erroneous."[40]

It is not believed that the court in this case intended to hold, or did hold, that there could be no recovery in case the infant had not actually been of service to the parents at the time of his death; but it simply held that there must be testimony given as to the reasonable value of the service of a child in the same condition in life as the deceased child.

The jury may take into consideration in cases where the infant is already earning a small wage the fact that the earning capacity of the infant might materially increase as the child gets older. When it was argued by the appellant in *Gulf Refining Co. v. Miller*[41] that the verdict was excessive, the evidence showing that the deceased's earnings, based upon his present earnings, from the time of his death until his majority would have been only $3,675, and judgment being given for $11,000, the court said:

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[37]Ihl v. Forty-Second St. & G. St. Ferry R.R., 47 N. Y. 317, 321, 7 Am. Rep. 450, 452 (1872).

[38]*Ibid.* For a collection of cases so holding see TIFFANY, DEATH BY WRONGFUL ACT (1913) 355, n. 72.

[39]81 F.(2d) 522 (C.C.A. 5th, 1936).

[40]*Id.* at 525.

[41]153 Miss. 741, 121 So. 482 (1929).

> "But counsel for appellant does not take into consideration that this boy is shown to have been a healthy, intelligent, industrious boy, who loved his parents devotedly, and who worked and gave his money to his mother; and we think counsel is in error in assuming that such a boy's capacity would not have increased rapidly during the 7½ years, which is the time for which the calculation is to be made."[42]

And in addition to the amount which the child might have earned during his minority, the jury may take into consideration the services which the child would reasonably have performed in the family, including acts of kindness and attention which would administer to the comfort of its members.[43]

However far the courts have gone in allowing the jury to speculate upon the pecuniary value to the parents of the life of young children, they have drawn the line at living children, and exclude prospective offspring of a pregnant mother whose death has been caused by wrongful act.[44]

If the present value of the life expectancy of the decedent is made the basis of recovery, as has been suggested previously, then it is error to allow damages for loss of services of an infant and include in such loss of services the amount that would have been earned by the infant, since the life expectancy is calculated from the time of the death of the child and not from the time of majority, and to allow both would be to allow double recovery.[45] Nevertheless, it would seem proper to allow recovery for the loss of services which the child performed around the house, which are not included in the amount which the child would have earned during his minority.

Although damages for loss of services have been most frequently allowed in instances where the decedent was an infant, they are by no means confined to these situations. In fact, it appears that damages of this nature might be had in any case in which the parties bringing suit were legally entitled to the services forming the basis of the claim. Damages have always been allowed for the loss of services of the wife. In a wrongful death action by the surviving husband and minor children, where evidence showed age, health, and habits of industry of deceased, including services rendered as wife and mother, it was held that the jury might consider the value of loss of such services and companionship, although

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[42]*Id.* at 748, 121 So. at 484.

[43]Louisville, N. A. & C. Ry. v. Rush, 127 Ind. 545, 26 N.E. 1010 (1891).

[44]"They [the jury] were allowed to estimate the pecuniary interest which a husband had in the chance that an embryo, not yet quickened into life, would have become a living child. The sex could not be known, and, if born alive, the infant might have been destitute of some faculty, or so physically infirm as to have made it a helpless charge. There are no elements whatever upon which a jury could base any conclusion that a pecuniary injury had been suffered by the plaintiff from the loss of the unborn child, and this inquiry should have been excluded from the consideration of the jury as too remote and speculative to form an element in the recovery." Butler v. Manhattan Ry., 143 N. Y. 417, 38 N.E. 454, 455, 26 L.R.A. 46, 47, 42 Am. St. Rep. 738, 740 (1894).

[45]Hines v. Moore, 124 Miss. 500, 87 So. 1 (1921).

there was no opinion evidence as to such value.[46] It has also been held that in estimating the amount of damages sustained by the widow of a decedent, the jury might take into consideration the hsuband's services in assisting in the care of the family.[47]

Loss of Gratuities

It is now well settled that damages may be recovered for loss of gratuities caused by the wrongful death of the decedent.[48] But "It is not all possible gratuities which might be recovered in a case, even where gratuities are properly recoverable, but only such gratuities as there is a reasonable expectation of receiving; and the reasonableness of the expectation of receiving gratuities in the future must be based on evidence that gratuities have been received in the past."[49] If it were otherwise, it is said that the issue would degenerate into one involving mere possibilities, speculations, or conjectures.[50] In answer to a contention that the parents of a child who was dutiful and worked cheerfully in assisting the support of the family might reasonably expect assistance from such child after maturity, the court said that " . . . whatever the mother would get from the child by way of services was what was hers by law, and not a gratuity."[51] But where an infant has a fortune of his own, and has been making contributions to his parents from it, he might reasonably be expected to continue this in the future, rich or poor.[52] It would also appear under this decision that the turning over of the earnings of an infant to his parents would not be sufficient indication of future gratuities, since what is turned over is not a gratuity, but legally was theirs all the while. But there seems to be no good reason why the courts should not allow recovery for gratuities when the parents do not require of the infant the money earned, and he voluntarily makes contributions therefrom. This is as much an indication that contributions will continue to be made as when they are made from a private fortune.

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[46]"It is difficult to value the services of such a wife and mother in terms of money, and, with all the facts in reference to the nature and character of these services before it, a jury is as competent to determine the money value thereof as any witness could be, and the determination of that question may be, and, in the very nature of things, must largely be, left to the sound judgment of the jury." Standard Coffee Co. v. Carr, 171 Miss. 714, 724, 157 So. 685, 688 (1934). Should there be any difference between this case and the case of a suit for the loss of services of an infant child in so far as the requirement for evidence of the value of services is concerned? Is not one as susceptible of proof as the other, and is not the need for proof as great in the one case as in the other?

[47]Goodyear Yellow Pine Co. v. Anderson, 171 Miss. 530, 157 So. 700 (1934); St. Louis & S. F. R.R. v. Moore, 101 Miss. 768, 58 So. 471, 39 L.R.A. (N.S.) 978, Ann. Cas. 1914B 597 (1912).

[48]For a full discussion of this question see Comment (1935) 7 MISSISSIPPI LAW JOURNAL 436.

[49]Cumberland Tel. & Tel. Co. v. Anderson, 89 Miss. 732, 744, 41 So. 263 (1906).

[50]Avery v. Collins, 171 Miss. 636, 157 So. 695 (1934).

[51]Cumberland Tel. & Tel. Co. v. Anderson, 89 Miss. 732, 745, 41 So. 263, 264 (1906).

[52]*Ibid.*

The pecuniary condition of both the decedent and the beneficiary may be shown as bearing upon the amount of damages to be allowed for gratuities.[53]

Of course if the life expectancy of the decedent forms the basis of recovery, gratuities made from the earnings of the deceased cannot be taken into consideration. Any assessment for loss based upon gratuities to be received in the future is at its best purely speculative. There is no means by which a jury can even approximate the amount of loss arising out of the wrongful death of the deceased when the whole basis of recovery has its foundation in the very unstable frame of mind of the decedent, wavering with the faintest touch of fancy or caprice, and dependent upon all the attendant future circumstances, which are impossible to predict. Surely a more certain and it seems a more fair method would be to discard the gratuity element altogether insofar as it conflicts with the life expectancy theory and to use the latter instead in computing the damages to the beneficiaries.

Loss of Companionship and Society

Loss of companionship and society is an element of damage when it is shown that the beneficiaries sustained a loss by the deprivation thereof; but damages for such deprivation have never been allowed by way of solatium, that is, a salve to wounded feelings or as a balm for distress and grief.[54] Any evidence touching the relationships of the deceased and the beneficiaries may be taken into consideration in estimating damages for such loss. In *Goodyear Yellow Pine Co. v. Anderson,*[55] quoting from an earlier case,[56] the court said:

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[53]Illinois C. R.R. v. Crudup, 63 Miss. 291 (1885). The court in discussing this question said: "The evidence offered by the defendant to show the pecuniary condition of the plaintiff should have been admitted. . . . it is yet true that in these cases in which there is no legal obligation owing from the deceased to the next of kin, and only an occasional gratuity can reasonably be expected, the circumstances and pecuniary condition, both of the deceased and the next of kin, are important as furnishing some light for the explanation of what is at best an uncertain and hypothetical field of investigation. It must, in any event, be a matter of conjecture to a greater or less extent what contributions a father might reasonably expect to receive from an adult son if the circumstances of the son are such that he can without serious detriment to his own prospects in life contribute materially to the comfort of a needy parent; the common experience and observation of mankind would lead to the belief that more liberal contributions would be made than could be expected if the pecuniary condition of the parties was reversed. It would seem to us that a satisfactory determination of the reasonableness of an expectation of this character can only be approximated by a consideration of all the circumstances which would impel the one to give or withhold, and the other reasonably to expect to receive, the contributions contemplated by the statute as the basis of damages." *Id.* at 302.

[54]Avery v. Collins, 171 Miss. 636, 157 So. 695 (1934); Goodyear Yellow Pine Co. v. Anderson, 171 Miss. 530, 157 So. 700 (1934); Standard Coffee Co. v. Carr, 171 Miss. 714, 157 So. 685 (1934); Yazoo & M. V. R.R. v. Beasley, 158 Miss. 370, 130 So. 499 (1930); Gulf Refining Co. v. Miller, 153 Miss. 68, 121 So. 295 (1929); Moore v. Johnson, 148 Miss. 827, 114 So. 734 (1927); Gulf & S. I. R.R. v. Boone, 120 Miss. 632, 82 So. 335 (1919); St. Louis & S. F. R.R. v. Moore, 101 Miss. 768, 58 So. 471, 39 L.R.A. (N.S.) 978, Ann. Cas. 1914B 597 (1912).

[55]171 Miss. 530, 537, 157 So. 700, 701 (1934).

[56]St. Louis & S. F. R.R. v. Moore, 101 Miss. 768, 780, 58 So. 471, 475, 39 L.R.A. (N.S.) 978, 985 (1912).

" 'In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of comfort, protection, and society of the husband, in the light of all the evidence in the case relating to the character, habits, and conduct of the husband, and to the marital relations between the parties at the time of and prior to his death. . . .' "

In *Gulf & S. I. R. R. v. Boone*,[57] where the brothers and sisters of decedent were suing for his wrongful death, the court said that the amount of recovery for the companionship and society should be influenced by the fact that the decedent was a soldier and would not be with the plaintiffs for a major portion of the time. Loss of any care and moral training to the children during their minority as a result of the wrongful death of their parent may, also, be taken into consideration in assessing the amount of damages to be allowed.[58]

Pain and Suffering Caused Deceased

The plaintiffs may recover damages for the pain and suffering endured by the deceased up to the time of the death,[59] but where the death is instantaneous,[60] or deceased is unconscious from the time of injury until death,[61] there can be no recovery for mental or physical suffering. Neither can the damages be enlarged on account of the horror and shock of the tragedy.[62] The burden of proving that the deceased suffered for a few seconds is upon the plaintiffs.[63]

Medical and Funeral Expenses

Under those statutes which allow recovery for only damages resulting to the beneficiaries from the wrongful death of the deceased, it is generally held that expenses incurred by the decedent before his death for medical attention, *etc.*, cannot be recovered, as such expenditures are not made in consequence of the death of the deceased, and cannot, therefore, be an injury to the beneficiaries resulting from the death.[64] But such reasoning has no application in Mississippi because of the broad provisions of the statute allowing recovery for damage resulting to the decedent as well as the parties suing. Upon the same reason it would appear that money expended by the beneficiaries for medical attention ought to be allowed.[65]

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[57]120 Miss. 632, 82 So. 335 (1919).

[58]Standard Coffee Co. v. Carr, 171 Miss. 714, 157 So. 685 (1934).

[59]Murry Chevrolet Co. v. Cotten, 169 Miss. 521, 152 So. 657 (1934).

[60]Moore v. Johnson, 148 Miss. 827, 114 So. 734 (1927); Yazoo & M. V. R.R. v. Lee, 148 Miss. 809, 114 So. 866 (1927); Illinois C. R.R. v. Fuller, 106 Miss. 65, 63 So. 265 (1913).

[61]Gulf & S. I. R.R. v. Boone, 120 Miss. 632, 82 So. 335 (1919).

[62]*Ibid.*

[63]Avery v. Collins, 171 Miss. 636, 157 So. 695 (1934).

[64]McCormick, Damages (1935) § 97; Tiffany, Death by Wrongful Act (1913) 330, § 157.

[65]In the case of Natchez, J. & C. R.R. v. Cook, 63 Miss. 38 (1885), it was held that the mother might recover for medical attention, care and nursing up to the time of death of the infant, but it will be noted that this suit was not brought under the wrongful death act, for the then existing statute did not give the mother the right

The question of whether damages may be recovered by the plaintiffs for the funeral expenses incurred by reason of the wrongful death of the decedent has not been passed upon in Mississippi. In fact, this point was expressly pretermitted by the court in the case of *Yazoo & M. V. R. R. v. Barringer*.[66] In that case suit was brought by the administrator of the decedent, there being no statutory beneficiaries, asking for damages for the funeral expenses of the deceased; but the court said that, "Whether such expenses may be taken into consideration by the jury in awarding damages for the decedent's death is not here presented for decision, for the record does not disclose that any such expenses were incurred,"[67] it appearing that the expenses were paid by a friend of the deceased, which payment was evidently a gratuity. The courts in other jurisdictions are divided as to this point. Some follow the English view, which does not allow any recovery for this item;[68] but in a large majority of the states it has been held that funeral expenses are recoverable when the plaintiff has paid them or has rendered himself legally liable to pay them.[69] However, it has been held when the expenses were paid out of the estate of the deceased that they were not a proper element of damages, since the amount expended would necessarily have been spent at a later date, and the only damage was the premature payment of such sum.[70] But in commenting on this holding the New Hampshire court in the case of *McCarthy v. Souther*[71] said:

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to maintain an action. This, however, would appear to be immaterial, for it is clear that if this was an element of damage at common law for which recovery might be had, it might still be recovered under the present statute allowing compensation for damages of all kinds to both the decedent and the parties interested in the suit.

[66]138 Miss. 296, 103 So. 86 (1925).

[67]*Id.* at 304, 103 So. at 87. Ethridge, J. dissented from that part of the decision holding that the funeral expenses could not be recovered by the representative of the decedent saying: "In my opinion the funeral expenses brought about by the wrongful killing of the decedent are actual damages to the decedent, because the estate of the decedent is charged with the expenses of the funeral, and such expenses are a preferred claim against the estate of the decedent under section 2113, Code of 1906; Hemingway's code, section 1761. It is not necessary for the declaration to show the actual payment of funeral expenses, nor that the administrator has incurred them before he may recover. He may sue before notice to creditors has been published, and any person may incur them, and may probate his claim therefor after the notice is published. . . .

"It seems to me that nothing could be clearer than the fact that the funeral expenses flow directly, logically, and necessarily from the death, and as under our law the decedent must pay his funeral expenses out of his estate, it is a pecuniary damage to him. Whatever damages a person's estate is a damage to him. It is certainly a reasonable proposition to hold that a person who wrongfully inflicts death upon another should pay the expenses of his funeral." *Id.* at 305, 103 So. at 88.

[68]TIFFANY, DEATH BY WRONGFUL ACT (1913) 331, § 157; Note (1935) 94, A.L.R. 440.

[69]For a collection of cases see TIFFANY, DEATH BY WRONGFUL ACT (1913) 331, § 157, n. 32. See also Note (1935) 94 A.L.R. 440, 441 *et seq.*

[70]Brady v. Haw, 187 Iowa 501, 174 N. W. 331, 7 A.L.R. 1306 (1919). See Note (1920) 5 IOWA L. BULL. 270 for a discussion of this subject and of the above case.

[71]83 N. H. 29, 137 Atl. 445 (1927).

> "The suggestion that death, not caused by the defendant's fault, would have eventually occurred to make necessary the expense, does not meet the fact that this death was caused by such fault, and that the funeral expenses was thereby occasioned. The fact that an event is bound to happen does not relieve one from his statutory responsibility for being the agency producing the happening."

If the dissenting opinion of Judge Ethridge in the *Barringer* case is in any wise indicative of the possible attitude of the Mississippi court, it would seem that it would adopt the rule announced by the New Hampshire court.[72]

Punitive Damages

In addition to those elements of damages that have been discussed in previous sections, that of punitive damages may be included in a proper case.[73] The court in the case of *Illinois C. R. R. v. Fuller*[74] said:

> "We believe that our statute which authorizes the recovery of all damages of every kind to the deceased, and all damages of every kind to those who have a right to sue for his wrongful death, does not limit the recovery to pecuniary loss alone, but is broad enough to cover punitive damages. We, therefore, conclude that under our statute punitive damages may be recovered in actions for death by wrongful acts."

Comparison of Life Expectancies of Decedent and Beneficiaries in Assessment of Damages

In the assessment of damages to the beneficiary incurred by the wrongful death of the decedent, the life expectancy of the deceased and the beneficiary must be compared and damages calculated upon the basis of the number of years the shorter lived of the two would have lived. This rule was very early recognized in the case of *Illinois C. R. R. v. Crudup,*[75] the court saying:

> "In all cases of this character it must be the expectation of that one who would soonest die which must control. If it be shown that the deceased in the course of nature would have died first, his expectation of life should control, for he could confer no benefit after his death; on the other hand, if the next of kin would die first, his expectation should govern, for he cannot receive a benefit from any one after his death. Since the plaintiff, the father of the deceased, would by all known probabilities have died in the course of nature before his son, his expectancy and not that of the son should control."

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[72]See note 67 *supra.*

[73]Young v. Columbus & G. Ry., 165 Miss. 287, 147 So. 342 (1933); Yazoo & M. V. R.R. v. Barringer, 138 Miss. 296, 103 So. 86 (1925); Carrier Lumber & Mfg. Co. v. Boxley, 103 Miss. 489, 60 So. 645 (1913).

[74]106 Miss. 65, 78, 63 So. 265, 268 (1913).

[75]63 Miss. 291, 303 (1885).

In *Mississippi Cotton Oil Co. v. Smith,*[76] it was held that a mother suing for the death of her minor son could not recover the value of his prospective earnings before his arrival at majority in the absence of proof as to her age, health, constitution, *etc.,* as it was the expectancy of the one who would die the sooner which must control. More recently the court has re-announced the view of the older cases.[77]

This comparison is complicated to a large extent when there is one suit brought for the benefit of several beneficiaries. Whose life expectancy is to control if the expectancy of the decedent exceeds that of one or more of the beneficiaries but not of the others? Is the expectancy of each individual beneficiary to be compared with that of the decedent, and damages assessed upon these individual comparisons? If so, then how is the sum allowed upon this basis to be divided so that each beneficiary will receive that amount allowed him upon his individual comparison; for the statute provides that any amount recovered must be divided equally between the persons coming within the class allowed to bring suit under the statute? In such case it seems that the method of compensation is inconsistent with the method of distribution provided by statute.

Distribution of Damages

The statute provides:

> "Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death."

This arbitrary method of distribution is obviously inconsistent with any theory of compensation, based upon individual injury. Perhaps all the damages allowed as damages to the decedent ought to be distributed equally among all the beneficiaries, as one can lay no greater claim to that than another; but there is no reason why damages assessed for loss of gratuities, services, companionship, *etc.,* should be distributed equally among the beneficiaries without regard to the individual injuries sustained by such losses. It seems that a better method of distribution would be to allow the jury to prorate the total amount recovered among the beneficiaries according to the individual damages suffered by each party to the suit.

Clifford L. Leggett.

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[76]95 Miss. 528, 48 So. 735 (1909).
[77]Goodyear Yellow Pine Co. v. Anderson, 171 Miss. 530, 157 So. 700 (1934).

WHAT IS THE EFFECT IN MISSISSIPPI OF A DIVORCE DECREE OBTAINED IN A COUNTY NOT PRESCRIBED BY STATUTE?

Mississippi as a state has jurisdiction to divorce her domiciliaries;[1] and as long as the requirements of due process of law are complied with the state legislature can establish the courts and procedure through which divorces can be obtained. Section 1417 of the Code of 1930 provides:

> "The bill [for divorce] must be filed in the county in which the complainant resides, if the defendant be a non-resident of this state or be absent, so that process cannot be served and the manner of making such parties defendants so as to authorize a decree against them in other chancery cases, shall be observed. If the defendant be a resident of this state, the bill shall be filed in the county in which such defendant resides or may be found at the time, or in the county of the residence of the parties at the time of separation, if the complainant be still a resident of such county when the suit is instituted."

The Mississippi Supreme Court has never had occasion to determine definitely the effect that will be given to non-compliance with the provisions in regard to the county or counties in which the bill should be filed. The statute could be construed: (1) as giving *jurisdiction of the subject matter* of a divorce action in any particular case to only a specified court or courts within the state; (2) as giving *jurisdiction of the subject matter* of any divorce case that could properly be tried in the state to every chancery court within the state, but as giving to each of these courts power to acquire by personal service *jurisdiction of the person* of the defendant only when it is a proper forum under the statute; or (3) as giving to every chancery court within the state both the jurisdiction of the subject matter of any divorce case properly triable in the state and the power to acquire by personal service the jurisdiction of the person of any defendant residing or "found" anywhere in the state.

If the first construction is adopted, the statute is undoubtedly a statute of jurisdiction; and in any specified case no court in the state other than those desginated in the statute has the power to grant a decree of divorce, even if both parties appear and consent to trial on the merits without objection. Jurisdiction of the subject matter of an action cannot be conferred by consent of the parties, and any decree granted in the absence of such jurisdiction is a complete nullity.[2]

If the second construction is adopted, no chancery court in the state other than the ones prescribed by statute has power to decree a divorce unless the defendant by a general appearance gives the court jurisdiction

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[1] GOODRICH, CONFLICT OF LAWS (2d ed. 1938) 334, § 123; STUMBERG, CONFLICT OF LAWS (1937) 268; 17 AM. JUR. 277, § 248.

[2] 15 C. J. 802, § 101. See also 7 R.C.L. 1039, § 70, where it is stated that "Where there is want of jurisdiction of the subject matter, a judgment is void as to all persons, and consent of parties can never impart to it the vitality which a valid judgment derives from the sovereign state. . . . "

of his person.[3] Process cannot issue from a court which is not a proper forum under the statute so as to enable that court to acquire jurisdiction of the person of a defendant. If this construction should be adopted, there is some diversity of opinion as to whether the statute would be one of jurisdiction or of venue.[4] The Mississippi Court would probably consider it as one of venue.[5] However, for the purposes of classification, this construction will be referred to as the one whereby courts other than those specified by statute lack power to acquire jurisdiction of the person of the defendant by process.

If the third construction is adopted,[6] every chancery court in the state has the power to hear any divorce case triable anywhere in the state; and its process will run state-wide for the purpose of acquiring personal jurisdiction of the defendant. Mere presence of power to try the case, how-

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[3]In 7 R.C.L. 1039, § 70, it is said "While it is true that no consent of parties can give a court jurisdiction of the subject-matter of a suit which the court did not possess without such consent, it is equally true that a court can obtain jurisdiction over a person by the consent of such person. This rule is based on the fact that it is a mere personal privilege of a defendant to insist that he be personally served with a summons within the jurisdiction of the court, or that jurisdiction of his person be acquired in some other legal manner, and that, being a personal privilege, he may consent to the jurisdiction of a court without exacting performance of the usual legal formalities." See also Springer v. Shavender, 118 N. C. 33, 23 S.E. 976, 33 L.R.A. 222 (1896).

[4]In Note (1926) 11 MINN. L. REV. 260, 261, the distinction between jurisdiction and venue is expressed in this manner: "Jurisdiction concerns the power of a court to hear and determine the subject matter in controversy between the parties to a suit, or to exercise any judicial power over them. Venue deals with the particular district or locality where the action should be brought. Where there is a jurisdictional lack, the acts of a court are nullities. . . . Where, however, jurisdiction exists, venue is merely a personal privilege and may be waived, and though the venue be manifestly improper, it cannot be questioned by the judge, but must be raised and presented to the court by a litigant who has not previously waived his right." The distinction drawn seems to be a good one and is recognized in many states. See Paige v. Sinclair, 237 Mass. 482, 130 N.E. 177 (1921); Burke v. Malaby, 14 Okla. 650, 78 Pac. 105 (1904). If it is recognized, the statute, if given the second construction, would be one of jurisdiction. There would be no power in the court to try the case in the absence of consent by the defendant; and a statute withholding power is, in a strict sense, one of jurisdiction. However, the Mississippi court evidently takes a different view, and there is some authority supporting its position. See note 21 *infra*.

[5]See note 21 *infra*.

[6]The decision of Lamar v. Houston, 183 Miss. 260, 184 So. 293 (1938), indicates that the statute will not be given this third construction. In that case, the husband attempted to make a collateral attack on a decree of divorce formerly granted to his wife by the court of a county which was improper under the statute. In the former action the husband had been personally served within the state, but made no appearance at the trial. Although it was held that the husband was estopped to question the decree, it was evidently considered that the decree sought to be attacked was void because of lack of jurisdiction in the court granting it. It does not appear affirmatively from the decision that the husband had not been personally served in the county wherein the decree was granted; and if he had been thus served, the decision would indicate that the statute confers jurisdiction of the subject matter of a bill for a divorce to a particular court or courts. But it seems that if service had been made on the husband in the county of the forum, a question would have been raised as to whether the court granting the decree was not proper as the court of the county in which the defendant was "found."

ever, would not mean that the court should exercise the power; and, under this construction, the court could, on its own motion,[7] or should, at the instance of the defendant, transfer the suit to a court proper under the statute. Nevertheless, if the defendant makes no appearance and the court proceeds to trial on the merits, the decree rendered would be valid. This construction would make the statute unquestionably a statute of venue.[8]

In a majority of the states it is considered that so far as counties within a state are concerned, an action for divorce is transitory[9] in nature; and the statutes specifying the place divorce action should be brought are therefore given the same construction as statutes in regard to the place of bringing ordinary transitory actions.[10] There seems to be no good reason why divorce actions should not, as between counties in a state, be considered as actions transitory in nature. It is true that in determining the power of different states to decree divorces, an action for divorce is not and should not be subject to the same considerations as the usual transitory action.[11] Courts of states which are not the proper forum according to the jurisdictional rules that have been evolved in regard to divorce litigation should not acquire jurisdiction to act by the consent or

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[7]In the usual transitory action, there would, as indicated in the definition of venue given in note 4, *supra,* be no reason why the court should transfer on its own motion. A rule of venue is one made for the benefit of the defendant, and he himself should invoke it. However, as will be seen, in order to avoid any possibility of collusion, good policy might suggest that in divorce actions a court not the county of the residence of the complainant or the defendant should, on its own motion, transfer the case to a county in which one of the parties has a residence. See Miss. Laws 1940, c. 233. But the fact that the court could or should transfer would not negative power in the court to render a valid decree on the merits. Avoidance of the problem of void divorce decrees might justify this policy. See note 18 *infra.*

[8]See the definition of venue given in note 4 *supra.*

[9]Transitory actions may be classified generally as actions growing out of contract or personal obligations; and such actions may be brought in any jurisdiction wherein the defendant can be found. See Central Maine Power Co. v. Maine Central R.R., 113 Me. 103, 93 Atl. 41 (1915); State *ex rel.* Nyquist v. District Court of Swift County, 164 Minn. 433, 205 N.W. 284 (1925); Brown v. Brown, 155 Tenn. 530, 296 S.W. 356 (1927). If the defendant is within the jurisdiction of a state, however, it is not necessary that he reside or be found in the county wherein suit is brought. The constitution and legislative enactments of a state determine the policy in regard to the extent of jurisdiction to be exercised by courts within the state.

[10]17 Am. Jur. 288, § 267; see 19 C. J. 36, § 57, where it is said in regard to actions for divorce: " . . . It has been generally held that, if defendant is a resident of the state, the venue is waived by failure to appear, or by appearance and answer without objection to the venue." If this be true, the general holding is that divorce statutes are strictly venue statutes. In support of this conclusion, see Tudor v. Tudor, 101 Ky. 530, 41 S.W. 768 (1897); Gibbs v. Gibbs, 26 Utah 382, 73 Pac. 641 (1903); and Geis v. Gallus, 130 Ore. 619, 629, 278 Pac. 969, 972 (1929), where it is said: "It has been generally held that in a divorce suit, the venue is waived by failure to appear." However, in Mississippi the statutes prescribing the counties in which an ordinary transitory action can be brought are not strictly venue statutes. See note 21 *infra.* This being true, the Mississippi divorce statute could not very logically be treated as a statute of venue.

[11]The characteristic feature of a transitory action is that the right of action follows the person of the defendant. Transitory actions are not confined to any particular state, but can be entertained in any state wherever jurisdiction of the parties can be obtained. 14 Am. Jur. 423, § 229; 21 C.J.S. 47-49, §§ 38-42.

presence of the parties. The reason is that some other state has the most significant interest in the marital status of the parties; and that the policies of that other state in regard to the dissolution of that status should be allowed to control.[12] The states differ considerably in their attitude toward divorce, an domiciliaries of a state should be governed by the policies of their own state. In regard to counties within a state, however, the considerations are different. There should be no variance in divorce policies between counties, and the state should not be injured by the bringing of the suit in the improper county. As in the ordinary transitory action, only the defendant could be materially injured and only he should have the right to complain; and in determining whether a divorce defendant has waived his right to complain or has consented to any injury that might be done him, the same principles should apply as in the case of the defendant in the usual transitory action.

There is authority, however, to the effect that statutes similar to the Mississippi statute give certain courts jurisdiction of the subject matter of a particular divorce action and that the decree of any other court in regard to that particular action would in any situation be void, regardless of the consent of the parties to the action.[13] In support of this position it has been urged that the public welfare demands that the bonds of matrimony be not lightly set aside, and that there is less probability of successful collusion or unfair advantage where the parties have resided and are known, than there is in a county where neither has resided and which the plaintiff may select for the purpose of securing a divorce.[14] There is possible merit in this contention. The interest of the public in the preservation of the marital relation might, to some extent, distinguish divorce suits from ordinary suits, even as between counties.[15] Nevertheless, good reason supports a holding that the statute should not be held to relate to jurisdiction of the subject matter. As has been said by the Supreme Court of Kentucky.[16]

> "If the jurisdiction in such cases is to depend upon the residence of either party on the day suit is brought, then without the required residence the judgment is void, and would be liable to be questioned in every case in which it might be offered in evidence . . . . The residence . . . might be difficult to prove, the proof might be conflicting, and it might happen that in one case in which the validity of a judgment was called in question it would be sustained, and in another held invalid, thus subjecting those interested to the most perplexing and embarrassing anxiety of un-

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[12] 2 Beale, Conflict of Laws (1935) 702, § 135.1; Goodrich, Conflict of Laws (1938) 334, § 123.

[13] 17 Am. Jur. 288, § 267; Note (1911) 20 Ann. Cas. 341. See also Watts v. Watts, 130 Ga. 683, 61 S.E. 593 (1908); Beach v. Beach, 4 Okla. 359, 46 Pac. 514 (1896); Bruner v. Bruner, 43 S.W. 796 (Tex. Civ. App. 1898).

[14] See authorities cited in note 13 *supra*.

[15] Avoidance of the possibility of collusion is an additional reason why an action for divorce should not be considered as a transitory action as between states. See note 70 *infra*.

[16] Tudor v. Tudor, 101 Ky. 530, 41 S.W. 768, 769 (1897).

> certainty . . . It seems to us . . . that the defendant in a divorce case may, by failing to plead or object[17] to the jurisdiction on account of the suit not being brought in the county of the residence of the female defendant, waive the question of jurisdiction or venue, and in such an event the court will have complete jurisdiction to hear and determine the case on its merits."

This approach seems to embody a better consideration of the public and personal interests involved. Conceding that the state could in some instances possibly be injured if the court of any county in the state could grant to any parties residing in the state a valid decree of divorce, the possibility of injury should be but slight;[18] and the uncertainty and other unsatisfactory results caused by a declaration of invalidity of a divorce decree are very undesirable. Moreover, the Mississippi statute does not seem to contemplate prevention of injury of the nature discussed. Suit against a resident defendant can be filed in any county in which he can be found; and suit against a non-resident can be brought in any county in which the plaintiff chooses to reside. It is obvious, therefore, that the parties can, if they so desire, give any chancery court in the state jurisdiction to try the case, even if the statute is considered to relate to the jurisdiction of the subject matter of a particular divorce case. Under the statute, therefore, the bill can be filed in counties with which the marriage had no connection; and this fact seems to negative any legislative intent to afford protection to any interest the state might have in regard to the bringing of suit in a particular county or counties.

Good policy, therefore, as well as the weight of authority, seems to suggest that, as between counties within a state, divorce actions should be considered as transitory in nature. It is also true that there is logical authority which suggests that the Mississippi statute under consideration should be treated as one relating strictly to venue.[19] It is clear from numerous Mississippi decisions that the Mississippi statutes in regard to the place of bringing ordinary transitory actions do not limit jurisdiction of the subject matter of actions to those courts which are the proper forums

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[17]This argument would also sustain the view that the statute should relate to strict venue. But in Mississippi it is evidently considered that even in transitory actions a defendant sued in a county improper under the statute is under no duty to appear and object. See note 21 *infra.*

[18]Any possibility of collusion that might exist could to a great extent be eliminated if courts other than those prescribed by the statute would, on their own motion, transfer a case to the court of the county of residence of one of the parties. In order to avoid the problem of void divorce decrees, the power to try should be present; but in order to prevent any possibility of collusion, the power should not be exercised unless the court is a court of the residence of one of the parties. If such were the policy, the desirability of certainty in all cases would greatly outweigh any remote possibility of collusion.

It seems that the policy of transferring the case to a court of the county of the residence of one of the parties would be a wise one to adopt in those cases where a defendant is "found" in a county other than that of his residence.

[19]The quotation in the text from the decision of the Supreme Court of Kentucky in the case of Tudor v. Tudor, 101 Ky. 530, 41 S.W. 768, 769 (1897), would support this conclusion. See also the authorities cited in note 10 *supra.*

under the statute.[20] If any court has jurisdiction of the subject matter of the class of transitory actions to which any particular case belongs, it has jurisdiction of the subject matter of that particular case. But several decisions of the Mississippi Supreme Court in regard to usual transitory actions,[21] and at least one decision in regard to divorce actions,[22] seem to indicate that the statutes designating the place of bringing these actions do not relate strictly to venue and that a trial court not a proper forum under the statute cannot have its process issue so as to obtain personal jurisdiction of a defendant. If this be true, then, as has been seen, a court other than those proper under the statutes has no jurisdiction to try a case in the absence of consent by the defendant, and its decree in the absence of such consent would be a nullity. Under this view, the situation between counties within the state is substantially the same as it is between different states. And although there are some decisions of the Mississippi Supreme Court which could be interpreted as treating the statutes concerning transitory actions as strictly statutes of venue,[23] the view that they are not

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[20]In State *ex rel.* Gully v. Massachusetts Bonding & Insurance Co., 187 Miss. 66, 72, 191 So. 285 (1939), it is said in regard to MISS. CODE ANN. (1930) § 363, which provides that "all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant may reside or be found," that "this statute does not confer jurisdiction, but fixes the venue or locality in which suits may be tried of which the chancery court has jurisdiction." See also Ravesies v. Martin, 199 So. 282 (Miss. 1941); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920); Christian v. O'Neal, 46 Miss. 669 (1872).

[21]See Perry v. Nolan & Marris, 159 Miss. 384, 131 So. 252 (1930); Hager v. Coburn, 150 Miss. 193, 116 So. 540 (1928); Campbell v. Triplett, 74 Miss. 365, 20 So. 844 (1896); Andrews v. Powell, 41 Miss. 729 (1868); Wooley v. Bowie, 41 Miss. 553 (1867). In Campbell v. Triplett, *supra,* it is said: "The writ, as a summons, was served upon the defendant in another county, and on this service the circuit court of Winston County rendered judgment by default against him. The court had no jurisdiction over defendant, and the motion to vacate the judgment should have been sustained. The venue of civil actions of this class is in the county 'in which the defendants or any of them may be found,' and if no defendant is served with process in the county in which the suit is brought, the jurisdiction of the court does not attach." 74 Miss. at 367, 20 So. at 844. It therefore seems that no court in the state other than those prescribed by statute has power to have its process issued so as to acquire jurisdiction of the person of the defendant in an ordinary transitory action. Nevertheless, it is evident from the decisions cited in this footnote and in note 20, *supra,* that the statutes prescribing the counties in which the actions can be brought are considered venue statutes. The choice of language of the Mississippi court finds some support in authority. In DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928) 476, n. 1, it is said: "Many writers and judges use the term 'jurisdiction over the subject matter' for jurisdiction, and 'jurisdiction over the person' for venue. When the words are understood to be used in the designated technical sense, the nomenclature 'jurisdiction' and 'venue,' though, is believed to be preferable." See also Smith v. Barr, 76 Minn. 513, 79 N.W. 507 (1899); Loftus v. Pennsylvania R.R., 107 Ohio St. 352, 140 N.E. 94 (1923).

[22]Lamar v. Houston, 183 Miss. 260, 184 So. 293 (1938), discussed in note 6 *supra.*

[23]Ravesies v. Martin, 199 So. 282 (Miss. 1941); State *ex rel.* Gully v. Massachusetts Bonding & Insurance Co., 187 Miss. 66, 191 So. 285 (1939); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920); Catlett v. Drummond, 113 Miss. 450, 74 So. 323 (1917); Christian v. O'Neal, 46 Miss. 669 (1872). In Catlett v. Drummond, *supra,* Catlett filed suit in a justice of the peace court in one district of Hinds County, and Drummond resided and was personally served in an-

seems to be the one that has been adopted. In support of the position taken by the Mississippi Court, it could be said that if the plaintiff were allowed to select a forum in some part of the state remote from the county of the residence of the defendant and require the defendant to appear there, even for the purpose of requesting a change of venue, abuse to the defendant would undoubtedly result; and it is true that there would be a possibility of abuse. It could be urged, however, that the Mississippi statutes in regard to the place of bringing suit do not contemplate prevention of this kind of abuse. The defendant can be sued, not only in the county of his residence, but in any county in which he may be found. This being true, the statute allows, to some extent at least, the abuse complained of.[24]

But, whatever be the policy finally adopted in this regard, it should be the same when the divorce statute is under consideration as it is when the statutes in regard to ordinary transitory actions are being considered.[25] As between counties within a state, divorce should be treated as an ordinary transitory action. Since it is certain that every court in the state having jurisdiction of the subject matter of the class of cases to which any transitory action belongs has jurisdiction of the subject matter of that particular case,[26] it should follow that every chancery court within the state has jurisdiction of the subject matter of any divorce case properly triable in the state. If this be true, any defendant whom the state has jurisdiction to divorce can by his consent give any chancery court in the state power to grant the divorce.

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other district in the same county. Drummond did not appear, judgment by default was taken against him, and he appealed on the ground that the judgment was void. The court said: "The cause of action upon which Drummond was sued by appellant in the justice of the peace court was transitory in character and within the general jurisdiction of such a court, and the fact that Drummond may have been at that time a freeholder or householder of another district cannot now be availed of by him, for the reason that the provision of Section 2724, Mississippi Code of 1906, fixing the venue of action before a justice of the peace against a freeholder or householder in the district of such freeholder's or householder's residence confers 'a mere personal privilege which may be waived by failure to claim it in the proper manner and at the proper time'; that is, by objecting at the trial to the cause being proceeded with, and proving the existence of the facts upon which such a claim must rest, from which it follows that the judgment rendered against him by the justice of the peace is valid." 113 Miss. at 455, 74 So. at 324. This, however, was a case involving the jurisdiction of a justice of the peace court over a defendant residing in the county in which the court sat, although not in the same district.

[24]Coffman, *Jurisdiction or Venue* (1936) 20 MINN. L. REV. 617, strongly urges that state statutes in regard to the place of bringing of transitory actions should be considered as strict venue statutes and should therefore have no effect on the power of a court to determine a cause.

[25]In fact, from the view point of policy, there might be more reason why the divorce statute should not be considered as withholding power from courts not proper under the statute. Where there is an absence of power, a decree granted is void. In the usual case, no serious complications arise from a void judgment or decree. However, problems sometimes arising when a divorce decree is void have proved perplexing; and unless there is some good reason why the decree should be considered void, the problems should not be permitted to arise. The question, therefore, should be whether possibility of injury to defendants and to the state if the statute should be held to be one of strict venue would outweigh the desirability of certainty in divorce decrees.

[26]See note 20 *supra*.

As has been seen, however, there is authority to the effect that statutes in regard to the place of bringing divorce actions are entirely jurisdictional; and that, therefore, a decree granted by a court not proper under the statute is void, even though both parties were before the court and went to trial on the merits without objection.[27] It is entirely possible that the Mississippi statute will be considered as requiring this construction.[28]

Thus there is much uncertainty as to whether an action for divorce will be considered as a transitory action, and possibly some doubt as to the effect that will be given the statute if it is so considered. The view, or views, of the court in this regard might in many cases prove important. Let it be assumed that the bill has been filed in a county which is neither the county of the residence of the plaintiff,[29] the county of residence of the defendant, nor a county in which the defendant was "found" for the purpose of personal service. Let it be assumed further that (1) the defendant appears and goes to trial on the merits without objection; or (2) the defendant is served by personal process within the state and makes no appearance; or (3) the defendant, being a non-resident or being absent from the state, is served only by publication and makes no appearance. Each of these hypothetical situations will be separately considered.

In the first situation, it might be held that the court is a proper forum under the statute as the court in which the defendant is "found." A general appearance is usually given the effect of personal service properly issued insofar as jurisdiction of a court is concerned,[30] and there seems to

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[27]See note 13 *supra.*

[28]Chancellor Amis suggests that the Mississippi statute requires this construction. AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI (1935) 328, § 239. In support of his conclusion he cites May v. May, 158 Miss. 68, 130 So. 52 (1930); Dulion v. Folkes, 153 Miss. 91, 120 So. 437 (1929); Dukes v. State, 57 Miss. 229 (1879). In *May v. May,* the court did not have occasion to consider directly the question herein discussed In *Dulion v. Folkes,* the court held that no court other than the chancery court of the residence of a minor can remove the disability of the minor. The statute on which the ruling was made, MISS. CODE ANN. (Hemingway, 1917) § 300, provided that "The chancery court of a county in which a minor resides may remove the disability of his minority." It is to be noticed that this statute did not provide that disability could be removed in any county in which the minor could be found; and there is, therefore, a material difference between it and the divorce statute. It is also true that the considerations applying in cases of removal of disability of minority differ to some extent from those applying in divorce cases. At any rate, from a viewpoint of policy, an invalid removal of minority does not make probable the complications usually arising from a void divorce decree.

Dukes v. State dealt with jurisdiction of a probate court and is therefore not controlling on the point under discussion.

[29]If the defendant is a resident of the state, the court of the county of residence of the complainant would not be a proper forum under the statute unless the separation occurred in that county.

[30]14 AM. JUR. 387, § 193; 21 C.J.S. 133, § 85. See also Clay v. Clay, 134 Miss. 658, 99 So. 818 (1924), in which the wife, a resident of the state, filed a bill for divorce against her husband, who was a non-resident. The husband was made a party by publication, but appeared in court by counsel and filed a plea to the jurisdiction, which he subsequently withdrew. The statute under which the wife brought her case, MISS. CODE (1906) § 1675, provided that "the jurisdiction of the chancery court in suits for divorce shall be confined to the following classes of cases; . . . (b) Where the complainant was domiciled within this state when the suit was commenced, and

be no good reason why it should not be given a similar effect in this situation.[31] If it is given such effect, a decree granted would be valid even though the statute be considered as entirely jurisdictional in character. There is authority, however, to the effect that, since jurisdiction of a divorce action cannot be acquired by consent, a court cannot acquire jurisdiction by the appearance of a defendant upon whom service has not been made as required by statute.[32] If such a doctrine controls, a decree given pursuant to an appearance without proper service must be considered as void. Logically, however, there seems to be no reason why such a doctrine should control. Both parties were before the court, and trial was had on the merits. Protection of some policy of the state would be the only justification for holding the decree void; and, as has been seen, it is difficult to see how any state policy would be contravened if the decree should be considered valid.

This problem should not arise unless it is considered that the statute relates to jurisdiction of the subject matter and that it is therefore necessary to the validity of a decree that the forum rendering it be one specified as proper by the statute. If the statute gives every chancery court in the state jurisdiction of the subject matter of any divorce action properly triable in the state, the only reasonable assumption is that the demonstrated consent of the defendant would enable any of such courts to render a valid decree on the merits. This should be true even though the court would have had no power to acquire by its process jurisdiction of the person of the defendant; and it would certainly be true if such power existed.

In the second situation listed—the one in which the defendant is served personally within the state but makes no appearance—it is obvious that the court would not be a proper forum under the statute. Therefore, if the statute is considered as relating to jurisdiction of the subject matter, any decree rendered would be void. In fact, unless the statute is considered strictly a statute of venue, the decree would be void; for in order that a decree rendered in such circumstances be valid, it would be necessary that the court have, not only jurisdiction of the subject matter of the suit, but power to acquire by its process personal jurisdiction of the defendant. And, as has been observe, several decisions of the Mississippi court seem to indicate that the statute will not be considered strictly as one

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the defendant was personally served with process within the state." The question was whether or not there was lack of jurisdiction in the trial court because the husband was not personally served with process in this state. The court held that the trial court had jurisdiction, saying: "As far as results are concerned, personal appearance by a defendant in a cause gives the court jurisdiction of his person as completely as if he had been personally served with process within the state." 134 Miss. at 663, 99 So. at 819.

[31]The only reason why it should not be given this effect is that the state has an interest in having the action brought in a county with which the marriage had some connection in order that there be less possibility of collusion. As has been noted, the possibility of collusion should be but slight and the statute does not seem to attempt to eliminate any possibility that might exist. See note 18 *supra,* and accompanying text.

[32]Henry v. Henry, 79 N. J. Eq. 493, 82 Atl. 47 (1912); 17 Am. Jur. 301, § 294; 19 C. J. 104, § 260; Note (1911) 20 Ann. Cas. 341.

of venue.[33] It seems safe to prophesy, therefore, that in this situation a decree would in any case be void.

In the third situation—the one in which the defendant is a non-resident or is absent from the state, and is served by publication but makes no appearance—it is again obvious that the court is not a proper forum under the statute. It follows, therefore, that if the statute relates to jurisdiction of the subject matter, a decree rendered would be void. If the statute is strictly one of venue, the decree would, of course, be valid. If the statute is one which gives the court jurisdiction over the subject matter of the case, but denies it the power to acquire by its process personal jurisdiction of the person of the defendant, a more difficult problem is presented. When a defendant is a non-resident and the state has jurisdiction to grant a decree of divorce against him, personal jurisdiction of the defendant is not necessary to enable a court in the state to grant that decree.[34] This being true, it would seem that any court having jurisdiction over the subject matter of the suit would have power, after proper service by publication, to grant the divorce. It might be contended, however, that if a court could not acquire jurisdiction to act by personal process if the defendant were in the state, it cannot acquire jurisdiction to act by service of publication if the defendant is a non-resident or absent from the state. And, on first thought, it might seem an absurdity to hold that a court has jurisdiction to divorce a defendant who has been served only by publication when it would have had no jurisdiction had the defendant been a resident of the state and process had been served on him personally. There is, however, a difference in the two situations which might justify a distinction being made in regard to jurisdiction. In order to warrant declaring a decree void because of lack of jurisdiction in a court, it seems that it should appear that holding the decree valid would injure the defendant or contravene some policy of the state. As has been observed, the state has no reason to complain if the case is not tried at one of the forums specified by the statute; and the question of whether the defendant is injured should therefore be determinative.

When the defendant is a non-resident or is absent from the state, he is not in a position to be benefited by the usual statutory provisions which have in view fairness and justice to resident defendants. He does not have the right to require that the bill be filed at the place of his residence or in the county where the separation occurred. He can be sued in any county in the state where the complainant establishes a residence. Therefore, the statute does not afford him a great deal of protection, and it is difficult to see how he could be materially injured by a failure to comply with it.

On the other hand, the right to resort to process by publication is based on the ground of necessity and is limited to cases where personal service cannot be had on a defendant;[35] and when a defendant is a resident

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[33]See note 21 *supra*.

[34]17 Am. Jur. 297, § 286; 19 C. J. 102, § 248.

[35]Roberts v. Roberts, 135 Minn. 397, 161 N.W. 148, L.R.A. 1917C 1140 (1917); 17 Am. Jur. 297, § 287; 19 C. J. 100, § 243.

of the state and is present therein, he is entitled, not only to have process served on him personally, but by statute to have the bill filed in the county where the separation occurred or in the county wherein he resides or is found. When he is within the state, the policies allowing constructive service do not apply, and he is by statute entitled to some extent to the same consideration as the defendant in the ordinary case. Since he is an a position to be sued there or in the county of the place of separation, he has just as much right to complain when the suit is brought in a different county as does the defendant in the usual transitory action. The legislature has given the divorce defendant to some degree the same privileges it has given other defendants, and when the privilege is violated, similar principles should control in both instances. Since the defendant in the ordinary transitory action is apparently under no duty to appear when the statutory stipulations in regard to the place where suit should be brought have not been complied with,[36] the divorce defendant should be under no such duty. Since a decree granted against the defendant in the ordinary action in such a situation has been held void,[37] a decree against a divorce defendant should also be considered void.

The only one of these situations in which the Mississippi court is bound by precedent is the situation in which the forum is improper under the statute and the defendant is personally served within the state and makes no appearance. In such a case, the court has evidently committed itself to the doctrine that the forum lacks the necessary jurisdiction of the person.[38] In the other situations discussed, the court is free to decide whether it will impart validity to any decrees granted or whether it will consider them void.

The court could give the statute under consideration any of the interpretations that has been discussed and find authority to support its position. The interpretation given will in many situations determine whether a particular decree is void or valid. A brief consideration of the consequences sometimes resulting from void divorce decrees may be helpful, therefore, not only as providing solutions to problems that may arise if a decree is considered void, but also as providing a reason why a divorce decree should be considered valid unless there is good justification for considering it void.

Theoretically, a void divorce decree should be a complete nullity, having no effect whatsoever.[39] Some courts so treat it, allowing a direct attack by either of the parties or a collateral attack by either of the parties or by anyone having a sufficient interest in the invalidation of the decree, holding that "an estoppel cannot be based on a void decree or judgment."[40]

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[36]This is evidently true in Mississippi. See note 21 *supra.*

[37]See note 21 *Supra.*

[38]See Lamar v. Houston, 183 Miss. 260, 184 So. 293 (1938), discussed in note 6 *supra.* See also authorities cited in note 21 *supra.*

[39]See note 3 *supra.*

[40]*In re* Christiansen, 17 Utah 412, 433, 53 Pac. 1003 (1898). See also Hardy v. Smith, 136 Mass. 328 (1884); Smith v. Smith, 13 Gray 209 (Mass. 1859).

However, the general view,[41] and the one that has been adopted by the Mississippi court,[42] is that the "void" decree should be given the effect of validity as to some parties and for some purposes. Void divorce decrees have presented to the courts a peculiar problem. In many cases the parties act on them so as to put themselves and third persons in such positions that justice would best be served if the decree should be left undisturbed. On the other hand, the courts cannot afford to sanction as valid a decree rendered in a forum which sound rules of policy have established as having no jurisdiction. They thus find themselves in a position where by doing justice in a particular case they might possibly set a precedent that would encourage future infractions of settled and well-founded rules of policy. The problem has proved perplexing, and, in seeking to solve it, the courts have seized upon various devices.

The divorce complainant is not usually allowed to attack a decree either directly or collaterally in any subsequent proceeding.[43] This holding is justified either on the ground of estoppel[44] or on the theory that one who has invoked the jurisdiction of a court will not thereafter be allowed to deny that jurisdiction.[45] Whether or not the divorce defendant will be allowed to attack depends upon the circumstances of the particular case. If he appeared at the trial and made no contest as to the jurisdiction, or if such a contest was decided against him, some courts have used the doctrine of *res adjudicata* in denying him the right to a subsequent attack.[46]

If he was served only by publication and made no appearance at the trial, he is usually allowed to attack the decree[47] unless he has remarried or otherwise accepted the "benefits" of the void decree.[48] Where he has accepted the benefits of the decree, the courts have refused to let him ques-

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[41]See Harper, *The Myth of the Void Divorce* (1935) 2 LAW AND CONTEMP. PROB. 335; Harper, *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158; Jacobs, *Attack on Decrees of Divorce* (1936) 34 MICH. L. REV. 740, 959.

[42]See, *e.g.*, Lamar v. Houston, 183 Miss. 260, 184 So. 293 (1938); Cratin v. Cratin, 178 Miss. 881, 174 So. 255 (1937).

[43]RESTATEMENT, CONFLICT OF LAWS (1934) § 112.

[44]Ferry v. Troy Laundry, 238 Fed. 867 (D. Ore. 1917); Ellis v. White, 61 Iowa 644, 17 N.E. 28 (1883); Doe v. Carson, 141 Okla. 105, 283 Pac. 1017 (1929).

[45]In McGraw v. McGraw, 48 R. I. 426, 428, 138 Atl. 188, 189 (1927), the court said: "The authorities are almost unanimous to the effect that one who has voluntarily invoked the jurisdiction of a court and obtained a decree of divorce will not be heard, especially after the decease of the innocent party, to question the jurisdiction of the court." See also Starbuck v. Starbuck, 173 N. Y. 503, 66 N.E. 193 (1903); RESTATEMENT, CONFLICT OF LAWS (1934) § 112.

[46]Robson v. Kramer, 215 Iowa 973, 245 N.W. 341 (1932); Crane v. Deacon, 253 S.W. 1068 (Mo. 1923); Confer v. District Court, 49 Nev. 18, 234 Pac. 688 (1925). In Crane v. Deacon, *supra*, it was said that "the trial court could not have granted a decree of divorce unless the plaintiff had made out a case which involved the proof that she was a resident of St. Louis County. The finding of such facts is *res adjudicata*. . . ." 253 S.W. at 1070.

[47]Cratin v. Cratin, 178 Miss. 881, 174 So. 255 (1937); Field v. Field, 215 Ill. 496, 79 N.E. 443 (1905); Beeman v. Kitzman, 124 Iowa 86, 99 N.W. 17 (1904); Sammons v. Pike, 108 Minn. 291, 122 N.W. 168 (1909).

[48]Cratin v. Cratin, 178 Miss. 881, 174 So. 255 (1937); Arthur v. Israel, 15 Colo. 147, 25 Pac. 81, 10 L.R.A. 693; Mohler v. Shank, 93 Iowa 273, 61 N.W. 981 (1895).

tion it, invoking the doctrine of estoppel.[49] Theoretically, however, mere delay in moving to vacate should make no difference;[50] nor should the re-marriage of the other spouse.[51] The decree is void, and in theory there is no reason why the defendant should be required to attach any significance to it. Barring such a party on the ground of laches would be penalizing him for a failure to act when he was under no duty to act; estopping him because of the re-marriage of the other spouse would be "permitting such spouse to accomplish by two wrongs what he could not accomplish by the first one and would obviously put a premium on his second marriage."[52] However, delay suggests acquiesence, and where the second spouse knows of the decree and delays for a long period the bringing of suit, it might be held that there was an acceptance of the benefits.[53] The Mississippi court has reached such a decision,[54] saying that "in equity and good conscience she [the divorce defendant] should not be permitted to complain of the decree.[55] In the same opinion it was said, however, that the "appellee was under no obligation to institute a proceeding to set aside the decree until she acquired knowledge thereof";[56] and thus intimated that the mere lapse of time is in itself insufficient to warrant an estoppel. If the divorce complainant has re-married and the defendant knew of both the decree and the re-marriage and delayed bringing suit, there is more reason for a finding that the defendant has accepted the benefits of the decree and an invocation of the doctrine of estoppel. In such a case it is very probable that the court will not allow the defendant as long a period of delay as it would have had there been no re-marriage. If the defendant had no knowledge of the re-marriage of the complainant, in theory the fact of re-marriage should not alter the situation. However, in any case, the re-marriage will in all probability have some effect on the court, irrespective of the knowledge of the defendant, and will at least tend to influence it to search closely for grounds upon which an estoppel could be predicated.

If the court is without jurisdiction and the defendant is personally served within the state and makes no appearance, the same theory should apply as where the defendant is served only by publication and makes no appearance. But as has been seen, in Mississippi at least, knowledge by the defendant of the fact of the decree is important,[57] and personal service might be considered as conclusive evidence of that knowledge. If this is true, in this situation, lapse of time in itself may be sufficient to warrant an application of the doctrine of estoppel. The amount of time that will

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[49] *Ibid.*

[50] Sammons v. Pike, 108 Minn. 291, 122 N.W. 168 (1909); Dusenberry v. Dusenberry, 20 Pa. Dist. Ct. 678 (1911); Richmond v. Sangster, 217 S.W. 723 (Tex. Civ. App. 1920).

[51] See Harper, *The Validity of Void Divorces* (1930) 79 U. of Pa. L. Rev. 158, 175; Jacobs, *Attack on Decrees of Divorce* (1936) 34 Mich. L. Rev. 749, 800.

[52] Harper, *The Validity of Void Divorces* (1930) 79 U. of Pa. L. Rev. 158, 175.

[53] See Yarston v. Yarston, 32 N. J. Eq. 494 (1880); Dry v. Rice, 47 Va. 331, 137 S.E. 473 (1927).

[54] Cratin v. Cratin, 178 Miss. 881, 174 So. 255 (1937).

[55] *Id.* at 898, 174 So. at 256.

[56] *Id.* at 897, 174 So. at 255.

be required is uncertain and will vary with the circumstances. The re-marriage of the other spouse is an important circumstance, and the Mississippi court has manifested a definite reluctance to disturb a decree when to do so would be to taint a third party with adultery or bastardize children of the second marriage.[58] This being true, it seems logical to assume that only a slight period of delay will be allowed when there has been a re-marriage. This assumption seems to be borne out by a recent case,[59] where it was held that a delay of one year and three months constituted laches.

Even though it is conceded, however, that a particular decree is not subject to attack by either of the spouses, additional problems still present themselves as to the extent to which the effect of validity will be given the decree. It seems obvious that neither party would ever be allowed to demand any personal rights under the marriage.[60] On the other hand, it seems equally obvious that upon re-marriage either party could be prosecuted by the state for bigamy.[61] There is likewise the possibility that the

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[57]See text accompanying note 54 *supra*.

[58]See Lamar v. Houston, 183 Miss. 260, 184 So. 293 (1938); Kirby v. Kent, 172 Miss. 457, 160 So. 569, 99 A.L.R. 1303 (1935); Sykes v. Sykes, 162 Miss. 487, 139 So. 853 (1932); McAllum v. Sprinks, 129 Miss. 237, 91 So. 694 (1922). In Hester v. Hester, 103 Miss. 13, 29, 60 So. 6, 8 (1912), the court said: "A setting aside of the divorce at this time would render his second marriage and his living with his second wife illegal, and a violation of the laws of the land, and would render illegitimate the children born of the second marriage. We must consider that these children are innocent, and that it is the policy of the law, as far as possible, to preserve a status that would keep these children as the legitimate offspring from a legal marriage."

See also Harper v. Fears, 168 Miss. 505, 151 So. 745 (1933), (1934) 6 MISSISSIPPI LAW JOURNAL 443. In that case, a wife, not having heard from her husband for more than seven years, had remarried. Subsequently the husband appeared and he also had remarried. The first wife tried to establish a claim to the estate of the husband. The court said: "It seems to us that, when the period of absence has existed for seven years, the absent party not being heard from during that time, and the presumption being that he is dead, and the wife having acted upon such presumption in good faith and contracted another marriage, such marriage is legal. To hold otherwise in this case would be to convict five persons of adultery, and would bastardize three innocent children." 168 Miss. at 512, 151 So. at 747.

[59]Lamar v. Houston, 183 Miss. 260, 184 So. 293 (1938). In that case the court directly expresses its concern for the wife and child of the second marriage.

[60]Parmalee v. Hutchins, 238 Mass. 561, 131 N.E. 443 (1921); Estate of Richardson, 132 Pa. 292, 19 Atl. 82 (1890). In the case of *In re* Ellis' Estate, 55 Minn. 401, 56 N.W. 1056 (1893) the court said: "It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted by going into another State and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the State, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done?" 56 N.W. at 1059.

[61]Hood v. State, 56 Ind. 263 (1877); People v. Dawell, 25 Mich. 247, 12 Am. St. Rep. 260 (1872); People v. Baker, 76 N. Y. 78 (1879); Van Fossen v. State, 37 Ohio St. 317 (1881). See also the quotation from *In re* Ellis' Estate, 55 Minn 401, 56 N.W. 1056 (1893) set out in note 60 *supra*.

second spouse would be liable to prosecution for adultery.[62] The second spouse of either party should not in the usual case be allowed to question the decree, because he cannot ordinarily prove that he was injured thereby.[63] However, he might be allowed to do so if he could prove injury.[64] It is also entirely reasonable to assume that the children of the first marriage, having had their property interests curtailed by the enforcible interests of the second spouse, would in some instances be allowed to assert the decree's invalidity.[65] It is at any rate true that "frequently a decree is good as against some persons and a nullity when attacked by others."[66]

Obviously such a situation is confusing and unfortunate, subjecting those interested to the "most perplexing anxiety and uncertainty."[67] Certainty could be obtained, however, only by a decision that the decree in question is entirely valid or literally void. When, however, sound rules of policy require that the forum granting the divorce should not be established as having granted it properly, a decision that the decree was valid would be unwise as setting a dangerous precedent. On the other hand, if the decree has been so acted upon as to make it unjust to disturb it at the suit of the attacking party, a decision declaring it to be completely and literally void would also be undesirable.

The problem has proved difficult, and no satisfactory solution has been found. Permitting it to arise unnecessarily is unwise. If no state policy intervenes and no persons would be injured if the forum granting

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[62]State v. Woods, 179 Atl. 1 (Vt. 1935).

[63]See Harper, *Attack on Void Divorce Decrees* (1936) 34 MICH. L. REV. 959, 961.

[64]Hinkle v. Lovelace, 204 Mo. 208, 102 S.W. 1015 (1907).

[65]Estate of Hancock, 156 Cal. 804, 106 Pac. 58 (1909); Adams v. Adams, 154 Mass. 290, 28 N.E. 260 (1891); Burge v. Burge, 94 Mo. App. 15, 67 S.W. 703 (1902). In Hester v. Hester, 103 Miss. 13, 60 So. 6 (1912), Hester's first wife and the children of the first marriage sought to obtain from a second wife and the children of a second marriage certain property owned by Hester, who had died. It was urged by the first wife that the divorce Hester had obtained from her had been given after service by publication, and that publication had not been made according to law. The records recited that all necessary proceedings had been legally taken, and the minutes of the decree of the court granting the decree recited that the defendant had been legally in court. The court said: "It is well settled, that in collateral proceedings such a decision is conclusive of the jurisdiction of the court. Whether the court had the proper evidence before it on which to base such a decision cannot be inquired into collaterally, for that would be a question of error or no error, which manifestly can be entertained only in a court sitting to review the proceedings. This rule is absolutely essential, in order that faith and credit may be accorded by the community to the decrees and judgments of courts of record; and that parties acting in obedience to them, or acquiring rights under them, may have the confidence and repose the following from a conviction that the solemn judgments and decisions of the higher courts, so long as they remain unreversed, will not be disregarded." 103 Miss. at 27, 60 So. at 7.

This decision further evidences the fact that the court is reluctant to disturb a decree of divorce when to do so would be to make a second marriage adulterous and bastardize children of the second marriage; and evidences another basis upon which the court can refuse to disturb a decree. See Lamar v. Houston, 183 Miss. 260, 184 So. 293 (1938).

[66]Jacobs, *Attack on Decrees of Divorce* (1936) 34 MICH. L. REV. 959, 977.

[67]Tudor v. Tudor, 101 Ky. 530, 41 S.W. 768, 769 (1897).

the divorce should be allowed to grant divorces in similar situations in the future, there is no necessity for the problem to arise. The decree should be considered valid.

The cases in which the void divorce decree has caused most difficulty are cases wherein the court granting the decree was the court of state not having jurisdiction according to the rules that have been established in regard to divorce litigation. These rules are founded in the doctrine that the state having the most material interest in the marital status of the parties is injured if some other state dissolves that status.[68] The injury is presumed because of the variance in divorce policies between the different states. This variance is to a great degree[69] responsible for the fact that the jurisdictional rules in regard to divorce differ from those in regard to the ordinary transitory action. In fact, a reputable authority, in considering the void divorce decree problem from an interstate point of view, has suggested as a solution uniform legislation, uniformly enforced by the courts.[70]

Within the borders of a state, there is uniform legislation, uniformly enforced. Therefore logic, justice, and simplicity require that, as between counties, divorce actions should be considered as actions transitory in nature. If this is true, in determining whether a divorce decree is void because suit was not brought in a county prescribed by statute, the only question should be whether the one attacking would be unjustly injured if the decree should be held valid. If he appeared and consented to trial on the merits, he should be held to have consented to any injury he might have sustained. If he made a contest as to the propriety of the forum and the contest was decided against him, the fact that the forum was proper should be *res adjudicata.* If the defendant was served only by publication and made no appearance, it seems that the decree rendered should be considered valid. Since the statute permits a complainant to sue a non-resident or absent defendant in any county in which the complainant resides, it does not appear to have in view benefiting or favoring the defendant. This being true, he should have no reason to complain if the statute is not complied with.

The only situation in which the defendant could be materially injured and entitled to complain is the case where he is a resident of the state and a decree is rendered by a court which is improper under the statute and in which he did not appear. The Mississippi court has indicated that in such circumstances the court has no jurisdiction of the person of either a di-

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[68]See note 12 *supra.*

[69]The variance is probably not the sole reason. The possibility of collusion in the court of a state not that of the domicil of either party might require that, as between states, divorce should not be an action transitory in nature. The same reasoning has been used to justify a holding that even as between counties within a state, an action for divorce should not be considered as transitory. And it is only true that the only difference seems to be one of degree. However, this difference is sufficiently substantial to justify a distinction being made in the two situations. See note 18 *supra.*

[70]See Bingham, *The American Law Institute vs. The Supreme Court. In the Matter of* Haddock v. Haddock (1936) 21 CORN. L. Q. 393, 418.

vorce defendant or a defendant in an ordinary transitory action.[71] Although other courts have taken a different view,[72] the position taken by the Mississippi court is not without logic. If the policy in this regard should be changed in regard to ordinary tranactions, however, it should also be changed in regard to divorce actions.

And even in this situation, the usual problems accompanying a void divorce decree should not arise. If the defendant acts on the decree or accepts its benefits, he should not be allowed to question it. And, since the court has indicated that mere delay after knowledge of the decree implies an acceptance of its benefits,[73] a defendant personally served would probably be required to act seasonably. As far as he is concerned, therefore, it seems that the decree is voidable instead of void. And when the defendant has put himself in such a position to be unable to question the decree, it should be considered as entirely valid. The only one injured has lost his right to complain. His inability to attack should run to his privies, and there is no reason why the decree should not be good as against the state.

Stanny Sanders

Master's Tort Liability to Servant in Mississippi*

V

Assumption of Risk

Before the enactment of the modern Workmen's Compensation Acts and other statutes restricting the common law defenses of employers, the doctrine of assumption of risk was frequently applied to exonerate a master from liability for personal injuries suffered by a servant while in furtherance of the master's business. There are three essential factors necessary for the application of this doctrine: (1) that certain dangerous conditions incident to the work were or ought to have been comprehended by the servant; (2) that, having this knowledge, he did or refrained from doing some act; (3) that as a consequence of this conduct he suffered the injury for which indemnity is sought.[1] This doctrine has been generally regarded as a branch of the maxim, *volenti non fit injuria,* which expresses the general principle that one who has consented to an injury has suffered no wrong.[2] A number of courts, however, have justified the doctrine by a fictitious presumption that the servant, by his contract of em-

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[71]See notes 21 and 22 *supra.*
[72]See note 10 *supra.*
[73]See note 56 *supra* and accompanying text.

*For previous articles in this same series, see Notes (1939) 12 Mississippi Law Journal 237 (Historical Background), (1939) 12 Mississippi Law Journal 243 (The Fellow-Servant Rule), (1940) 12 Mississippi Law Journal 454 (The Simple-Tool Doctrine), (1940) 12 Mississippi Law Journal 459 (The Changing-Place-of-Work Doctrine).

[1]3 Labatt, Master & Servant (2d ed. 1913) § 1163.

[2]Harper, Torts (1933) § 130; Bohlen, *Voluntary Assumption of Risk* (1906) 20 Harv. L. Rev. 14, also in Studies in the Law of Torts (1926) 441.

ployment, has impliedly agreed to assume the risks that are incident to the business.[3]

Although the basic principle of the doctrine is that the plaintiff, by his conduct, has consented to assume responsibility for injuries resulting from certain risks, this consent is usually not expressed but is implied from the conduct of the plaintiff under the circumstances. Thus at common law it was held that a workman who entered into an employment assumed all of the ordinary risks of the enterprise, since he was conclusively presumed to have knowledge of such risks.[4] It was said that there should be no recovery for such injuries since the servant was as competent as the master to protect himself from the ordinary and necessary risks of the employment. A master was not an insurer of the safety of his servants, and if he had exercised reasonable care to eliminate the dangers of the business, he would not be held responsible for injuries resulting from those dangers which remained after this duty had been discharged.[5] When applied to this class of cases, the doctrine of assumption of risk is only a convenient method of saying that there was no negligence on the part of the master—*i.e.,* that the master is under no duty to protect the servant from such risks as are reasonably necessary to the enterprise.[6] This precept becomes important in an analysis of Section 513 of the Mississippi Code of 1930, which provides that:

> "In all actions for personal injury to an employee, and in all actions where such injury results in death, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or in part from the negligence of the master. . . ."

The Mississippi court has held that this statute does not alter the common law as to injuries resulting from the ordinary and necessary risks of the employment, stating that "the risk that the servant assumes is the danger incident to the service which remains after the master has exer-

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[3]2 BAILEY, PERSONAL INJURIES (2d ed. 1912) §§ 357, 366; 3 LABATT, MASTER & SERVANT (2d ed. 1913) § 1165; Labbatt, *The Relation Between Assumption of Risks and Contributory Negligence* (1897) 31 AM. L. REV. 667, 668; Powell, *Some Phases of the Law of Master and Servant: An Attempt at Rationalization* (1910) 10 COL. L. REV. 1, 6; Note (1893) 47 L.R.A. 161, 163. The fallacy of this justification for the doctrine is shown in Alexander, *Re-Thinking Negligence* (1939) 11 MISSISSIPPI LAW JOURNAL 290, 302.

[4]Truly v. North Lbr. Co., 83 Miss. 430, 36 So. 4 (1904); Chesapeake & O. R.R. v. Nixon, 271 U. S. 218, 46 Sup. Ct. 495, 70 L. ed. 914 (1926); Southern Pac. R.R. v. Bershire, 254 U. S. 415, 41 Sup. Ct. 162, 65 L. ed. 335 (1921); 2 BAILEY, PERSONAL INJURIES (2d ed. 1912) §§ 365 *et seq.;* 3 LABATT, MASTER & SERVANT (2d ed. 1913) § 1167; PROSSER, TORTS (1941) § 51, p. 384.

[5]See Meridian Grain & Elevator Co. v. Jones, 176 Miss. 764, 169 So. 771 (1936) and the authorities cited therein; Comment (1935) 8 MISSISSIPPI LAW JOURNAL 219.

[6]HARPER, TORTS (1933) § 130; PROSSER, TORTS (1941) § 51; Alexander, *Re-Thinking Negligence* (1939) 11 MISSISSIPPI LAW JOURNAL 290, 291; Bohlen, *Voluntary Assumption of Risk* (1906) 20 HARV. L. REV. 14, also in STUDIES IN THE LAW OF TORTS (1926) 441; Paton, *Some Problems Relating to* Volenti Non Fit Injuria (1940) 9 BROOKLYN L. REV. 132, 137.

cised reasonable care for the safety of the servant."[7] This holding, of course, does not conflict with the statute, since a master who has exercised reasonable care for the safety of the servant cannot be said to have been negligent, and the statute does not apply unless the servant's injury "results in whole or in part from the negligence of the master." In view of the statute, however, the use of the term assumption of risk tends to confuse the proper application of the common law rule in this state; and, since in such cases it is used merely to show that there has been no negligence on the part of the master, it is suggested that the term should not be used. It should be recognized that the master is under *no duty* to protect the servant from injuries resulting from the ordinary risks of the employment.

This rationalization can be used to justify the fellow servant rule in Mississippi, since it can be said that the master is under no duty to protect a servant against the risk of injury by a fellow servant who has been selected with ordinary care by the master.[8] In view of Section 513, this method of expressing the rule seems to be somewhat clearer than stating that the risks of injury by a fellow servant are among the ordinary risks of the service and are therefore assumed by the servant. In like manner, it may be said that the master is under no duty to protect a servant from injuries resulting from the use of simple tools, although such hazards could be classed as ordinary risks of the employment.[9] The changing-place-of-work doctrine can also be explained in this manner, although the common law courts regarded the hazards arising as the work proceeds as among the ordinary dangers which are assumed by the servant.[10]

A similar situation is presented in those cases in which the servant himself deliberately selected a dangerous course of action which led to his injury. At common law it was said that a servant who chose an unsafe rather than a safe method of doing the work was barred from recovery by the doctrine of assumption of risk.[11] In Mississippi it should be

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[7]Meridian Laundry Co. v. James, 195 So. 689 (Miss. 1940); Eastman Gardiner Hardwood Co. v. Chatham, 168 Miss. 471, 151 So. 556 (1934); Crossett Lbr. Co. v. Land, 121 Miss. 834, 84 So. 15 (1920); *see* Stricklin v. Harvey, 181 Miss. 606, 179 So. 345 (1938); Gow v. Hunter, 175 Miss. 896, 168 So. 264 (1936); Wilbe Lbr. Co. v. Calhoun, 163 Miss. 80, 140 So. 680 (1932). In Crosby v. Burge, 1 So.(2d) 504, 507 (Miss. 1941), it was stated that, "While it was the duty of appellants to furnish reasonably safe instruments for doing the work, considering all the surounding circumstances, yet the appellee assumed the usual, ordinary, inherent and natural risks incident to the work he was doing."

[8]Note (1939) 12 Mississippi Law Journal 243.

[9]Wausau Southern Lbr. Co. v. Cooley, 130 Miss. 333, 340, 94 So. 228, 229 (1922); Middleton v. National Box Co., 38 F.(2d) 89 (S. D. Miss. 1930); Note (1940) 12 Mississippi Law Journal 454; *cf.* Alexander, *Re-Thinking Negligence* (1939) 11 Mississippi Law Journal 340, 354.

[10]3 Labatt, Master & Servant (2d ed. 1913) § 1177; Note (1940) 12 Mississippi Law Journal 459.

[11]3 Labatt, Master & Servant (2d ed. 1913) § 1166.

said that there was no negligence on the part of the master in such situations.[12]

At common law a servant assumed the ordinary and necessary risks of the employment even though the business itself was inherently dangerous. The same result should be reached in Mississippi, since an employer is not under a duty to eliminate all dangers incident to the work, but should be exonerated from liability if he has exercised due care to make the work as safe as possible under the dangerous circumstances.[13]

A servant who was injured by a defect in machinery or an unsafe place of work could not recover at common law if it was the duty of the injured servant himself to repair the machinery or make the place of work safe.[14] Such a servant was held to assume the risk of working with the defective appliance or in the unsafe place, since the additional hazards incident to repair work were said to be among the ordinary risks of such a task, even though the danger might have implied culpability on the master's part as regards other servants. Under Section 513 this same rule is more clearly expressed by recognizing that the master is under no duty to protect such a servant from injuries resulting from the very hazard which he is employed to eliminate.[15]

It is usually stated as a common law rule that a servant who has no knowledge, actual or constructive, of an *extraordinary* risk is not chargeable with its assumption.[16] But a "servant who, either before or after he commences the performance of the contract of employment, has ascertained, that the ordinary hazards of his environment have been augmented by abnormal conditions produced by the negligence of his master or his master's representative, and has accepted or continued in the employment without making any objection and without receiving any promise that the abnormal conditions will be remedied, is deemed, as a matter of law, to have assumed the risk thus superadded, and to have waived any right which he might otherwise have had to claim an indemnity for injuries resulting from the existence of that risk."[17] It is in cases of this sort,

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[12]Cobb Bros. Construction Co. v. Campbell, 176 Miss. 695, 170 So. 283 (1936); Brown v. Coley, 168 Miss. 778, 152 So. 61 (1934); Stokes v. Adams-Newell Lbr. Co., 151 Miss. 711, 118 So. 441 (1928); Barson Hatten Lbr. Co. v. Thames, 147 Miss. 795, 114 So. 25 (1927).

[13]Eastman Gardiner Hardwood Co. v. Chatham, 168 Miss. 471, 151 So. 556 (1934) (servant operated a re-saw in a hardwood mill); Yazoo & M. V. R.R. v. Hullum, 119 Miss. 229, 80 So. 645 (1919), *sugg. err. overr.*, 80 So. 784 (1919) (servant employed as guard to protect train from robbers); 3 LABATT, MASTER & SERVANT (2d ed. 1913) § 1174.

[14]Cumberland Tel. & Tel. Co. v. Cosnahan, 105 Miss. 615, 62 So. 824 (1913); 2 BAILEY, PERSONAL INJURIES (2d ed. 1912) § 370, p. 985; 3 LABATT, MASTER & SERVANT (2d ed. 1913) §§ 1175, 1176; *see* Illinois Central R.R. v. Emerson, 88 Miss. 598, 40 So. 818 (1906).

[15]Wade-Stevens Lbr. Co. v. Addy, 187 Miss. 851, 194 So. 303 (1940); Hines Lbr. Co. v. Dickinson, 155 Miss. 674, 125 So. 93 (1929); Waterman-Fouke Lbr. Co. v. Miles, 135 Miss. 146, 99 So. 759 (1924); *cf.* Yazoo & M. V. R.R v. Hullum, 119 Miss. 229, 80 So. 645 (1919), *sugg. err. overr.*, 80 So. 784 (1919).

[16]2 BAILEY, PERSONAL INJURIES (2d ed. 1912) § 373; 3 LABATT, MASTER & SERVANT (2d ed. 1913) § 1178.

[17]3 LABATT, MASTER & SERVANT (2d ed. 1913) § 68, p. 513.

where the master has breached some well-defined duty owed to his servants, that Section 513 has altered the common law rule. A master owes a duty to use reasonable care to provide safe instrumentalities and a safe place to work, to provide a sufficient number of competent fellow servants, to inaugurate and maintain a safe system of doing the work, and to warn and instruct his servants as to dangers of which they might be expected to remain in ignorance.[18] If the master breaches one of these duties, and if this negligence is the proximate cause of the servant's injury, Section 513 will prevent the master from escaping liability on the ground that the servant had assumed the risk.[19]

In cases in which the statute is held to abolish the defense of assumption of risk, the question of contributory negligence becomes important. Although very few cases have discussed the application of contributory negligence to such factual situations, it is submitted that such a plea should not be barred by the statute abolishing assumption of risk. While some courts have regarded assumption of risk as a branch of contributory

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[18]J. W. Sanders Cotton Mill v. Moody, 195 So. 683 (Miss. 1940); Neely v. Young, 186 Miss. 879, 192 So. 292 (1939); Virginia-Carolina Chemical Co. v. Jefferson, 186 Miss. 861, 192 So. 306 (1939); Scott Burr Stores Corp. v. Morrow, 182 Miss. 743, 180 So. 741 (1938); Albert v. Doullut & Ewin, Inc., 180 Miss. 626, 178 So. 312 (1938); Gow v. Hunter, 175 Miss. 896, 168 So. 264 (1936); Eagle Cotton Oil Co. v. Pickett, 175 Miss. 577, 166 So. 764 (1936); Newell Contracting Co. v. Flynt, 172 Miss. 719, 161 So. 298 (1935); Barron Motor Co. v. Bass, 168 Miss. 152, 149 So. 792 (1933); Goodyear Yellow Pine Co. v. Mitchell, 168 Miss. 152, 149 So. 792 (1933); *sugg. err. overr.*, 168 Miss. 152, 150 So. 810 (1933); Jefferson v. Denkmann Lbr. Co., 167 Miss. 246, 148 So. 237 (1933); Anderson v. McGrew, 154 Miss. 291, 122 So. 492 (1929); Sea Food Co. v. Alves, 117 Miss. 1, 77 So. 857 (1917); Edwards v. Hayes-Walker Lbr. Co., 113 Miss. 378, 74 So. 284 (1917); *see* Crosby v. Burge, 1 So.(2d) 504 (Miss. 1941); Brown v. Coley, 168 Miss. 778, 152 So. 61 (1934); Malone, *Work of the Mississippi Supreme Court—Torts and Negligence* (1938) 11 Mississippi Law Journal 76, 84; Butler, *Work of the Mississippi Supreme Court—Torts* (1940) 13 Mississippi Law Journal 86, 89; Notes (1940) 12 Mississippi Law Journal 454, (1940) 12 Mississippi Law Journal 459, (1939) 12 Mississippi Law Journal 243; Comments (1935) 8 Mississippi Law Journal 219, (1930) 3 Mississippi Law Journal 163.

[19]Curry & Turner Const. Co. v. Bryan, 184 Miss. 44, 185 So. 256 (1939) (inadequate rules and methods for working with dangerous instrumentalities); Aponaug Mfg. Co. v. Carroll, 183 Miss. 793, 184 So. 63 (1938) (defective equipment); Stricklin v. Harvey, 181 Miss. 606, 179 So. 345 (1938) (unsafe place of work); Gow v. Hunter, 175 Miss. 896, 168 So. 264 (1936) (unsafe place of work, inadequate system of doing the work, insufficient number of fellow servants); Mississippi Power & Light Co. v. Smith, 169 Miss. 447, 153 So. 376 (1934) (unsafe place of work); Standard Oil Co. v. Franks, 167 Miss. 282, 149 So. 798 (1933) (unsafe place of work); Wilbe Lbr. Co. v. Calhoun, 163 Miss. 80, 140 So. 680 (1932) (unsafe instrumentality); Randolph Lbr. Co. v. Minchew, 172 Miss. 535, 159 So. 849 (1930) (unsafe place of work); Planters' Oil Mill v. Wiley, 154 Miss. 113, 122 So. 365 (1929) (unsafe place of work); Hines v. Green, 125 Miss. 476, 87 So. 649 (1921) (master negligent in retaining a dangerous and vicious fellow servant); Sea Food Co. v. Alves, 117 Miss. 1, 77 So. 857 (1917) (unsafe place of work); *see* Durr v. Homochitto Lbr. Co., 137 Miss. 442, 454, 102 So. 257, 258 (1924). For examples of the application of the assumption of risk doctrine where Section 513 is not involved, see McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 176 So. 395 (1937); Gulf & S. I. R.R. v. Hales, 140 Miss. 829, 105 So. 458 (1925) (under the Federal Employer's Liability Act); *see* Mississippi Power & Light Co. v. Goosby, 187 Miss. 790, 192 So. 453 (1939).

negligence, and while others have so confused the two theories as to make it difficult to determine their proper relation, the distinction between the two defenses should be recognized since contributory negligence can be used in Mississippi to diminish the damages recoverable by a plaintiff. The theory of assumption of risk is based upon the mental condition of the servant prior to the time of his injury. The question to be determined, therefore, is whether he had impliedly consented to exonerate the master from liability for injuries sustained during the course of the work being performed. Contributory negligence, on the other hand, brings into consideration the question whether the course of conduct adopted by the servant, or some particular act done after he had committed himself to that course of conduct, was of such a character as to show that he was wanting in due care, and whether his carelessness had been a contributing cause of the accident. Assumption of risk, therefore, is dependent upon the preliminary question whether the servant's will was exercised freely and without constraint, while the defense of contributory negligence concerns itself with the subsequent question whether the behavior of the plaintiff, in the situation in which he placed himself by the exercise of his will, was or was not the behavior of a reasonably prudent man. Thus at common law, when the master proved an appreciation of the danger on the part of the servant and a continuance of work with that knowledge, two distinct issues were presented: (1) whether the continuance is to be regarded as circumstantial evidence of the servant's acceptance of the responsibility for any injuries which he might receive from the unsafe place of work or the dangerous instrumentality and (2) whether such continuance indicates a lack of due care. The intention of the servant is an important consideration in the first question, while his intention is wholly immaterial when it is sought to charge him with negligence. In like manner, assumption of risk cannot apply unless there has been actual or constructive knowledge of the risk and a free and willing assumption of it, whereas contributory negligence can apply where the servant does not know that there is a risk to be run.[20]

Since these defenses are entirely separate and independent, the plea of contributory negligence should be available to a master even though Section 513 will prevent him from maintaining the defense of assumption of risk.[21] Therefore if a servant voluntarily encounters a known risk

[20]A good discussion is found in Bradburn v. Wabash R.R., 134 Mich. 575, 578, 96 N.W. 929, 930 (1903). See 2 BAILEY, PERSONAL INJURIES (2d ed. 1912) § 354; HARPER, TORTS (1933) §§ 130 *et seq.;* 3 LABATT, MASTER & SERVANT (2d ed. 1913) §§ 1219 *et seq.;* PROSSER, TORTS (1941) § 51; Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233, 245, also in STUDIES IN THE LAW OF TORTS (1926) 516; Bohlen, *Voluntary Assumption of Risk* (1906) 20 HARV. L. REV. 14, 17, also in STUDIES IN THE LAW OF TORTS (1926) 445; Paton, *Some Problems Relating to* Volenti Non Fit Iniuria (1940) 9 BROOKLYN L. REV. 132, 142. Judge Alexander, in his excellent discussion of this subject, concludes that "for all practical purposes assumption of risk and contributory negligence are not distinct." Alexander, *Re-Thinking Negligence* (1939) 11 MISSISSIPPI LAW JOURNAL 290, 311.

[21]See St. Louis & S. F. R.R. v. Guin, 109 Miss. 187, 68 So. 78 (1915) in which the court recognized that the plaintiff's damages could be diminished because of his contributory negligence, even though he could not be barred by assumption of risk under MISS. CONST. § 193.

brought about by the negligence of the master, his damages should be diminished under a plea of contributory negligence if (1) a reasonably prudent person would not have encountered such a risk, or (2) he failed to use due care in working in the face of the known hazard.[22] Under the second consideration, it should be kept in mind that the very fact that there is a dangerous condition present may require the exercise of a higher degree of care than necessary under normal conditions.[23]

There are two classes of cases frequently arising under Section 513 which illustrate the relation of contributory negligence and assumption of risk. In some jurisdictions at common law, if the master *ordered* the servant to work under dangerous conditions or with defective machinery, and threatened to discharge the servant if he disobeyed, the servant was not held to have assumed the risk by continuing the work because his action then was not voluntary.[24] Several Mississippi cases have reached the same result with the same reasoning,[25] but under Section 513 the fact that the master commanded the servant to do the work is usually immaterial, because the defense of assumption of risk is not available even if the servant had voluntarily encountered such risks.[26] As far as assumption of risk is concerned, the master's command should be relied upon only in those situations where the command itself constituted the act of negligence on the part of the master.[27] When the defense of contributory negli-

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[22]See Seifferman v. Leach, 161 Miss. 853, 858, 138 So. 563, 564 (1932). If the plaintiff's actions reflect a wilful disregard for his own safety in the face of obvious dangers, he might be barred from any recovery. See page 610 *infra*.

[23]"The employee must be careful in the use of these defective appliances. It may be that the very fact that they are known to be defective requires a higher degree of care than would be demanded if all the agencies were perfect in construction. . . . " Yazoo & M. V. R.R. v. Scott, 95 Miss. 43, 48, 48 So. 239, 241 (1909).

[24]New York, N. H. & H. R.R. v. Vizvari, 210 Fed. 118, 126 C.C.A. 632, L.R.A. 1915C 9 (C.C.A. 2d, 1913); Tull v. Kansas City So. R.R., 216 S.W. 572 (Mo. App. 1919); Thomsen v. Hobst, 93 Neb. 375, 140 N.W. 269 (1913); 3 LABATT, MASTER & SERVANT (2d ed. 1913) § 1202; Comment (1939) 23 MINN. L. REV. 234.

The Mississippi Court reached the same result under the old Federal Employers' Liability Act, 35 STAT. 65 (1908), 45 U.S.C.A. §§ 51 *et seq.* (1934), where assumption of risk was a good defense. Pearl River Valley R.R. v. Moody, 178 Miss. 1, 171 So. 769 (1937). The federal statute has since been amended to abolish this defense "in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . . " 53 STAT. 1404 (1939), 45 U.S.C.A. § 54 (Supp. 1940).

[25]Goss v. Kurn, 187 Miss. 679, 193 So. 783 (1940); Newman Lbr. Co. v. Cameron, 179 Miss. 217, 174 So. 571 (1937); Everett Hardware Co. v. Shaw, 178 Miss. 476, 172 So. 337 (1937), *sugg. err. overr.*, 173 So. 411 (1937); Goodyear Yellow Pine Co. v. Mitchell, 168 Miss. 152, 149 So. 792 (1933); Gulf & S. I. R.R. v. Bryant, 147 Miss. 421, 111 So. 451 (1927); see Cobb Bros. Const. Co. v. Campbell, 176 Miss. 695, 170 So. 283 (1936); Eastman Gardiner Hardwood Co. v. Chatham, 168 Miss. 471, 151 So. 556 (1934).

[26]Hardaway Contracting Co. v. Rivers, 181 Miss. 727, 180 So. 800 (1938).

[27]For example, in Jefferson v. Virginia-Carolina Chemical Co., 184 Miss. 23, 185 So. 230 (1938), 186 Miss. 861, 192 So. 306 (1939), the servant was ordered to abandon a safe method of doing the work and adopt a dangerous system; in Gulf & S. I. R.R. v. Bryant, 147 Miss. 421, 111 So. 451 (1927), a minor servant was ordered to work in the rain under threats of discharge and of bodily harm; and in Cobb. Bros. Const. Co. v. Campbell, 176 Miss. 695, 170 So. 283 (1934), and Hercules Powder Co. v. Tyrone, 155 Miss. 75, 124 So. 74 (1929), the court recog-

gence is pleaded, however, the command given by the master should always be considered because it will be an important factor in determining whether the servant acted as a reasonable man in undertaking the work in the face of the increased hazards brought about by the master's negligence.

In like manner, at common law a servant was not held to assume the risk when he had complained of the dangerous situation to his master and had received a promise that the danger would be eliminated.[28] Several Mississippi cases have applied this rule under the assumption of risk statute,[29] although it would seem that this, too, should not be an important factor since the servant would not have assumed the risk even if he had continued the work in the absence of such a promise.[30] As to the question of contributory negligence, however, such a promise would be important in considering whether the servant had acted reasonably under the circumstances.

One important problem has not been adequately discussed. It arises in a situation where the servant deliberately and unnecessarily exposes himself to an obvious danger created by the master's negligence. In such a situation the servant's conduct would certainly constitute contributory negligence. Although the court might hold that contributory negligence is the only defense available to the master, it would be possible to deny any recovery on either of three possible bases. First, the court could say that although the master had been negligent, such negligence was not the proximate cause of the injury, since the servant had deliberately and

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nized that the master would be liable if he ordered the servant to perform the work in a dangerous manner when another available method would have avoided the danger; *cf.* Meridian Laundry Co. v. James, 195 So. 689 (Miss. 1940). In such cases, however, the fact that the servant's action might be classed as involuntary is not the true basis of liability; it is the fact that the master was negligent in giving such an order to the servant. This was clearly pointed out in the case of Hardaway Contracting Co. v. Rivers, 181 Miss. 729, 180 So. 800 (1938), in which a foreman directed the plaintiff and two fellow servants to lift a mat which was too heavy for three men to move. Since the master was negligent in failing to furnish a sufficient number of fellow servants, the plaintiff did not assume the risk of this negligence, regardless of whether he acted voluntarily or involuntarily.

[28]Hermanek v. Chicago & N.W. R.R., 186 Fed. 142, 108 C.C.A. 254 (C.C.A. 8th, 1911); Stafford v. Chicago, B. & Q. R.R., 114 Ill. 244, 2 N.E. 185 (1885); Feely v. Pearson Cordage Co., 161 Mass. 426, 37 N.E. 486 (1894); Rothenberger v. Northwestern Consolidated Milling Co., 57 Minn. 461, 59 N.W. 531 (1894); Sweet v. Ohio Coal Co., 78 Wis. 127, 47 N.W. 182, 9 L.R.A. 861 (1890); 3 LABATT, MASTER & SERVANT (2d ed. 1913) § 1197; PROSSER, TORTS (1941) § 51 p. 389.

The Mississippi court applied the same rule under the old Federal Employers' Liability Act. Pearl River Valley R.R. v. Moody, 178 Miss. 1, 171 So. 769 (1937); see Louisville & N. R.R. v. Russell, 164 Miss. 529, 538, 144 So. 478, 480 (1932); Gulf & S. I. R.R. v. Hales, 140 Miss. 829, 837, 105 So. 458, 459 (1925). For a criticism of this doctrine, see Alexander, *Re-Thinking Negligence* (1939) 11 MISSISSIPPI LAW JOURNAL 340, 357.

[29]Texas Co. v. Jackson, 174 Miss. 737, 165 So. 546 (1936); Miss. Utilities Co. v. Smith, 166 Miss. 105, 145 So. 896 (1933); see also Aponaug Mfg. Co. v. Carroll, 183 Miss. 793, 184 So. 63 (1938).

[30]See Alexander, *Re-Thinking Negligence* (1939) 11 MISSISSIPPI LAW JOURNAL 340, 364.

unreasonably encountered the danger.[31] Second, the court could hold that the master's duty was to use reasonable care to make the premises safe or to make the danger known to the servant, and that this duty had been discharged since the danger itself was obvious and since it was not necessary for the servant to encounter it.[32] Third, it might be said that the servant, by his conduct, had consented to the injury. This latter method of denying recovery borders dangerously near the purview of Section 513, and it might be said that it differs only in terminology from the forbidden doctrine of assumption of risk. It can be logically defended, however, because a person who consents to an injury should not be allowed to recover,[33] and it matters not whether this consent be expressed in words or implied by conduct. This principle has long been expressed by the maxim, *volenti non fit injuria.* Section 513 does not necessarily eliminate this principle from master and servant cases, because it could be said that the statute was intended to abolish only that peculiar defense which was available to the master because of the plaintiff's relation as servant; that it was not intended to place the servant in a more favorable position than members of the general public to whom the master owes similar duties.[34] Although many courts have regarded the doctrine of assump-

[31]It is very likely that the court would adopt this method of disposing of the problem. See Thompson v. Miss. Cent. R.R., 175 Miss. 547, 166 So. 353 (1936), where is was contended that the plaintiff should recover under the comparative negligence statute, but the court denied recovery by the application of the usual causation formulas. See the discussion of proximate cause in Crosby v. Burge, 1 So.(2d) 504. 507 (Miss. 1941).

[32]*Cf.* 2 BAILEY, PERSONAL INJURIES (2d ed. 1912) § 385. The adoption of this method might be very dangerous in that it could lead to some very undesirable results.

[33]HARPER, TORTS (1933) §§ 130, 131, 246.

[34]A similar result has been reached under the English Employers' Liability Act. Thomas v. Quartermaine, L.R. 18 Q.B.D. 685 (1887); Yarmouth v. France, L.R. 19 Q.B.D. 647 (1887). In Thomas v. Quartermaine, the court stated that since assumption of risk was abolished under the statute, it was proper to "Treat the plaintiff as freed from all fetters that would have arisen by implication out of his contract of service, view him on the hypothesis prescribed by the Act, as if he were not a workman, place him in the category, most favoured by the law, of a visitor invited by the employer to come upon premises on business of the employer's own." The court concluded that the servant was barred from recovery: "But where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defense in itself. But when it is a knowledge under circumstances that leave no inference but one, viz, that the risk has been voluntarily encountered, the defense seems to me complete." The court is thus holding that there was no negligence on the part of the master. This is because negligence is a breach of duty to a particular person, and although the master would have been negligent as to other servants injured by the same hazard under different circumstances, he did not owe a duty to protect the plaintiff-servant who voluntarily and unnecessarily encountered the obvious danger.

Compare Sea Food Co. v. Alves, 117 Miss. 1, 9, 77 So. 857, 858 (1918) where it was said: "As to the third contention of appellant, in which he invokes the doctrine of *volenti non fit injuria,* we think that the principle is inapplicable to this case. It does not appear from the record that the appellee willingly or of his own volition stepped into the hole, nor was he injured by his own consent, and there is no assumption of risk in this state, where the master is guilty of negligence."

tion of risk as applied in master-servant cases, as a branch of the maxim, *volenti non fit injuria,* it has been argued that these defenses are entirely separate and distinct;[35] that the maximum is a general principle applicable to any class of cases or persons, whereas assumption of risk is appropriate only where there is some contractual relation between the parties. It is shown that assumption of risk will apply to a broader class of risks than the maxim does, since a servant could not be barred by consent, as expressed in the maxim, unless he not only knew of the defect or delinquency and comprehended the nature and extent thereof, but also voluntarily encountered it. Assumption of risk, on the other hand, could be available as a defense in situations where the servant was entirely ignorant of the risk involved, and therefore could not have knowingly encountered it, if it was shown that the servant could have discovered the risk by the exercise of that skill and diligence which the implications of his contract of employment imposed upon him. It could thus be argued that a servant, by his conduct, could still consent to relieve his master from responsibility for injuries resulting from an obvious danger which he voluntarily and unnecessarily encountered.

Phineas Stevens

Application of the Louisiana Workmen's Compensation Law In Mississippi

There are two general theories[1] under which recovery is allowed in conflict of laws cases under Workmen's Compensation Acts.[2] They are: (1) Contract: The Act becomes part of the contract of employment and is applied as if the parties had contracted to let their rights and obligations be determined thereunder.[3] (2) Regulation of the status of employment:

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[35]Labatt, Master & Servant (2d ed. 1913) §§ 1163, 1287; Powell, *Some Phases of the Law of Master and Servant: An Attempt at Rationalization* (1910) 10 Col. L. Rev. 1, 25.

[1]California, Illinois and Massachusetts have repealed by statute the court's application of a tort theory to their Workmen's Compensation Acts. Cal. Stat. (1917) p. 831; Cal. Gen. Laws (Deering 1937) Act 4749, § 58; Ill. Laws 1925, p. 380; Ill. Rev. Stat. Ann. (Smith-Hurd, 1929) c. 48, § 142; Mass. Laws 1927, c. 309, § 3; Mass. Comp. Stat. (Supp. 1929) c. 152, § 26. Oklahoma has interpreted its compulsory act as not applying to injuries outside the state. Shehan Pipe-Line Const. Co. v. State Industrial Comm., 151 Okla. 272, 3 P.(2d) 199 (1931).

[2]See, generally, 2 Beale, Conflict of Laws (1935) §§ 398.1-403.1; Goodrich, Conflict of Laws (1938) § 97; Restatement, Conflict of Laws (1938) §§ 298-403; Stumberg, Conflict of Laws (1937) p. 188-198; Angell, *Recovery Under Workmen's Compensation Acts for Injury Abroad* (1918) 31 Harv. L. Rev. 619; Dunlap, *The Conflict of Laws and Workmen's Compensation* (1935) 23 Cal. L. Rev. 381; Dwan, *Workmen's Compensation and the Conflict of Laws—The Restatement and Other Recent Developments* (1935) 20 Minn. L. Rev. 19; Note (1940) 12 Mississippi Law Journal 491.

[3]This has been stated to be the prevailing rule. See cases cited in 2 Beale, Conlict of Laws (1935) § 392.2 and Stumberg, Conflict of Laws (1937) c. 8. For criticism of this view see Dwan, *Workmen's Compensation and the Conflict of Laws* (1927) 11 Minn. L. Rev. 329; Goodrich, Conflict of Laws (1927) § 97; Notes (1924) Harv. L. Rev. 375, (1923) 21 Mich. L. Rev. 499, (1933) 10 N.Y.U.L. Rev. 518, (1935) 84 U. of Pa. L. Rev. 85, (1921) 30 Yale L. J. 71.

The state has a right, under its police power, to provide that when employees are injured in the course of their employment, they will be compensated.[4]

However, in attempting to apply either of these theories to a specific situation, the question remains: In what cases will a particular Workmen's Compensation Act be selected as applicable? To answer this question the courts have considered and applied various elements or combinations of elements, some of which are as follows: (1) The place of execution of the contract of employment. Of course, this element is practically controlling in those states adopting the contract theory,[5] but it is not absolutely controlling, even in such states.[6] (2) The "governmental interest" doctrine: If a state has sufficient interests represented, it can apply its own compensation law, even though another compensation law is also applicable.[7] This consideration leads to the same result as the Louisiana "presumed intent" doctrine, which holds that upon consideration of various elements, the parties may be presumed to have intended to come under the local compensation law.[8] Of course in these considerations, all of the other elements mentioned herewith will be considered. (3) The "business

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[4]This view was first announced in Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 170 N.W. 275 (1919). This is apparently the modern view. Mattson v. Department of Labor & Industries of State of Washington, 293 U. S. 151, 55 Sup. Ct. 14, 79 L. ed. 251 (1934); Ocean Accident & Guarantee Corp. v. Industrial Comm., 32 Ariz. 275, 257 Pac. 644 (1927); North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L.R.A. 1917E 642 (1916); Village of Glencoe v. Industrial Comm., 354 Ill. 190, 188 N.E. 329 (1934); Illinois Steel Co. v. Fuller, 23 N.E. (2d) 259 (Ind. 1939); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936); Saucier's Case, 122 Me. 325, 119 Atl. 860 (1932); Tierney v. Tierney & Co., 176 Minn. 464, 223 N.W. 773 (1929); Glaze v. Gart, 225 Mo. App. 1205, 36 S.W.(2d) 684 (1931); Sullivan v. Anselmo Mining Corp., 82 Mont. 543, 268 Pac. 495 (1928); Meyer v. Nielsen Chevrolet Co., 137 Neb. 6, 287 N.W. 849 (1939); American Radiator Co. v. Rogge, 86 N. J. Law 436, 92 Atl. 85 (1914); Bizzelli v. Industrial Comm. of Ohio, 122 Ohio St. 201, 171 N.E. 108 (1930); Gerber v. State Industrial Accident Comm., 101 P.(2d) 416 (Ore. 1940); DeFelice v. Jones & Laughlin Steel Corp., 137 Pa. Super. 191, 8 A. (2d) 465 (1939); Marchbanks v. Duke Power Co., 190 S. C. 336, 2 S.E. (2d) 825 (1939); Lumberman's Reciprocal Ass'n v. Wilmoth, 12 S.W. (2d) 972 (Tex. Comm. App., 1929); Denning v. Quist, 172 Wash. 83, 19 P. (2d) 656 (1933).

[5]See note 3 *supra.*

[6]It is sometimes explained that, "Where a contract is to be performed wholly outside the state in which it is made, the parties are presumed to adopt the law of the place of performance as the law of the contract." Elk River Coal & Lumber Co. v. Funk, 222 Iowa 1222, 271 N.W. 204 (1937). See also Douthwright v. Champlin, 91 Conn. 524, 100 Atl. 97, Ann. Cas. 1917E 512, (1917).

[7]Alaska Packers Ass'n v. Industrial Comm., 294 U. S. 532 Sup. Ct. 518, 79 L. ed. 1044 (1935) is a leading case on this point. See also Pacific Employers Insurance Co. v. Industrial Acc. Comm., 306 U. S. 493, 59 Sup. Ct. 629, 83 L. ed. 940 (1939); United States Casualty Co. v. Hoage, 64 App. D. C. 284, 77 F.(2d) 542 (1935); McLaughlin's Case, 274 Mass. 217, 174 N.E. 338 (1931); State *ex rel.* Weaver v. Missouri Workmen's Comp. Comm., 339 Mo. 150, 95 S.W. (2d) 641 (1936); Esau v. Smith Bros., 124 Neb. 217, 246 N.W. 230 (1933).

[8]McKane v. New Amsterdam Casualty Co., 199 So. 175 (La. App. 1940). There is this "presumed intention" in many of the cases following the contract theory, under which the intent is presumed either by direct statutory provision or court construction. 2 BEALE, CONFLICT OF LAWS (1935) § 398.2.

localization" doctrine: When a business is localized in a state the employer should be required to compensate for injuries in a service incidental to its conduct, even if suffered beyond the borders of the state.[9] (4) The "employment localization" doctrine: When an employment is localized in a state, that state can require the employer to compensate for injury in such employment.[10] (5) Other practical elements: The courts may consider the place where the injured employee is likely to become a public charge and the practicability of his bringing suit in the forum.[11]

The Full Faith and Credit clause of the Federal Constitution may have application to this question. In *Bradford Electric Light Co. v. Clapper*,[12] the defendant company had its principal place of business and the plaintiff's decedent was domiciled in Vermont, his work being located both in Vermont and New Hampshire, although principally in Vermont, where the contract of employment was entered into. He was killed in New Hampshire. The Supreme Court of the United States held that the full faith and credit clause compelled New Hampshire to apply the Vermont Compensation Act, which provided that it should have exclusive application to injuries happening out of Vermont but in the course of an employment entered into in Vermont.[13] This even though the case was based on tort under the New Hampshire Employer's Liability Act, as allowed in that state. Subsequently, however, the Supreme Court held that a forum may apply its own compensation act and does not deny full faith and credit to the foreign statute unless the party relying thereon shows that of the interests involved, those of the foreign state are overwhelmingly superior.[14] The Mississippi court has declared, in effect: We feel it settled by *Bradford Electric Light Co. v. Clapper*[15] that we must follow the Louisiana Compensation Act, although injuries happened in this state. But the

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[9]2 BEALE, CONFLICT OF LAWS (1935) § 398.3. First announced in State *ex rel.* Chambers v. District Court, 139 Minn. 295, 166 N.W. 185, 3 A.L.R. 1347 (1918). See also Severson v. Hanford Tri-State Airlines, 105 F.(2d) 622 (C.C.A. 8th, 1939); Tripp v. Industrial Comm., 89 Colo. 512, 4 P.(2d) 917 (1931); Smith v. Menzies Shoe Co., 98 Ind. App. 132, 188 N.E. 592 (1934); Chicago, R. I. & P. Ry. v. Lundquist, 206 Iowa 499, 221 N.W. 228 (1928); Durrett v. Eicher-Woodland Lumber Co., 19 La. App. 504, 140 So. 867 (1932); State *ex rel.* Loney v. State Industrial Accident Board, 87 Mont. 191, 286 Pac. 408 (1930); Watts v. Long, 116 Neb. 656, 218 N.W. 410, 59 A.L.R. 738 (1928); Industrial Comm. v. Ware, 10 Ohio App. 375 (1919); McGuire & Cavender v. Edwards, 48 S.W.(2d) 1010 (Tex. Civ. App. 1932).

[10]2 BEALE, CONFLICT OF LAWS (1935) § 398.4. This is the test in New York. Cameron v. Ellis Const. Co., 252 N. Y. 394, 169 N.E. 622 (1930), *remittitur amended*, 253 N. Y. 559, 171 N.E. 782 (1930). Colorado and Ohio seem to suggest this test. Platt v. Reynolds, 86 Colo. 397, 282 Pac. 264 (1929); Industrial Comm. v. Cardinio, 119 Ohio St. 539, 164 N.E. 758 (1929).

[11]See, *e.g.*, Alaska Packers Ass'n v. Industrial Acc. Comm., 294 U. S. 532, 55 Sup. Ct. 518, 79 L. ed. 1044 (1935).

[12]286 U. S. 145, 52 Sup. Ct. 571, 76 L. ed. 1026, 82 A.L.R. 696 (1932).

[13]This view was followed in Weiderhoff v. Neal, 6 F. Supp. 798 (W. D. Mo. 1934); Cole v. Industrial Comm., 353 Ill. 415, 187 N.E. 520, 90 A.L.R. 116 (1933).

[14]Pacific Employers Ins. Co. v. Industrial Acc. Comm., 306 U. S. 493, 59 Sup. Ct. 629, 83 L. ed. 940 (1939); Alaska Packers Ass'n v. Industrial Acc. Comm., 294 U. S. 532, 55 Sup. Ct. 518, 79 L. ed. 1044 (1935).

[15]Orleans Dredging Co. v. Frazie, 173 Miss. 882, 896, 161 So. 699, 702 (1935).

subsequent cases were not before the court in this case, and they would undoubtedly be followed in their limitation and explanation of the *Bradford* case.

The attitude of the Mississippi court is well stated in the case of *Orleans Dredging Co. v. Frazie*,[16] in which the court said:

> "Under the Louisiana law his compensation for the injury is certain. Under the law of this state. . . ., his right of recovery is uncertain. He is a citizen of Louisiana. Therefore any doubts as to the applicable law should be solved in favor of the Louisiana law."[17]

The major premises here is not that the plaintiff was a citizen of Louisiana, but that under the Louisiana law his recovery would be certain. Mississippi has held that the equity court has power to make and enforce the same orders and decrees in a suit for an employee's death that courts or boards under the Workmen's Compensation Law in the state where the injury occurred would have, were the claim made there.[18]

The view that the construction given a statute by the courts of the state whose legislature enacted it will be adopted by the Mississippi courts, has been announced in *McArthur v. Maryland Casualty Co.*[19] in connection with the Louisiana Compensation Law and is generally followed in Mississippi.[20] This position which the Mississippi court has adopted makes it necessary to determine the Louisiana court's interpretation of the Louisiana Compensation Act, in order to find the rules upon which the Mississippi court will reach a decision when a case involving the Louisiana Act is again presented to it.[21]

In *Hargis v. McWilliams Co.*,[22] the first conflict of laws case under the Louisiana Workmen's Compensation Law, the court of Appeal of that state held that the Act had extraterritorial application and that it would suffice that the contract of employment be made in Louisiana to carry with it the liability of the employer as fixed by the Act. In *Festervand v. Laster*,[23] this ruling was followed. In *Durett v. Eicher-Woodland*

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[16]173 Miss. 882, 161 So. 699 (1935).

[17]*Id.* at 869, 161 So. at 701.

[18]Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1930). "When a statute of another state confers a right of action that is substantive, the Mississippi court will enforce it where it has machinery with which to do so." Burkett v. Globe Indemnity Co., 182 Miss. 423, 440, 181 So. 316, 319 (1938).

[19]184 Miss. 663, 186 So. 305, 120 A.L.R. 846 (1939).

[20]Vicksburg, S. & P. R.R. v. Porterfield, 103 Miss. 585, 60 So. 652 (1913); Balanico Medical College v. Atchinson, 41 Miss. 188 (1866); McIntyre v. Ingraham, 35 Miss. 25 (1858).

[21]" . . . sustains the writer's previous contention that Mississippi will voluntarily allow recovery under a foreign compensation act in preference to recovery under our tort law, even though the contracts with this state may be of greater importance than those with the foreign state." Note (1940) 12 Mississippi Law Journal 491, 493.

[22]9 La. App. 108, 119 So. 88 (1928).

[23]15 La. App. 159, 130 So. 634 (1930).

Lumber Co.,[24] the court followed the former cases, but also considered the fact that the parties concerned were residents of and domiciled in Louisiana. But on rehearing of this case,[25] it was held that the plaintiff was employed by an independent contractor located and doing business in Mississippi and only connected with the defendant company through a contract of work it had undertaken. The court said that the location of the industry where the plaintiff was to perform the services has more to do with his right of recovery than the place where he was employed. Thus the court followed the "business localization" theory to deny application of its Compensation Act. In *Selser v. Bragmans Bluff Lumber Co.*,[26] the court held that the Act applied where the contract of employment was entered into in the state between residents of the state and relief was sought in the courts of the state. The accident occurred in Nicaragua. In *Abood v. Louisiana Oil Refining Corp.*,[27] the court held that the contract of employment was made in Mississippi and that the plaintiff had moved there to make his permanent residence and that therefore the Louisiana Act did not apply. The court discussed the *Durrett* and *Hargis* cases, further explaining them under the "business localization" theory, so that:

> "where work is wholly to be performed in another state, not incidental to the business of the employer located in the state where the contract is entered into, the contract is governed by the Compensation law of the state where the work is to be performed, and not of the state where the contract was entered into."[28]

In *McKane v. New Amsterdam Casualty Co.*,[29] the court held that the former decisions do not compel the conclusion that all contracts of hiring made outside of Louisiana for work to be performed exclusively within the borders of Louisiana will be governed by the laws of the state where the contract was made irrespective of all other considerations. The court held that it is not in discord with the view that, if the work is to be performed in another state and if the parties contemplate that the job will be of a permanent nature, then the law of the place of performance will govern. If, on the other hand, the work is of a temporary or transient nature, the law of the place where the contract was made will apply. The expressions that the Louisiana law will apply only where the contract was made in Louisiana, it was explained, should be considered in connection with the question being decided: whether the Louisiana law will be given extraterritorial effect where the contract was made in Louisiana. The court concluded that with relation to the Workmen's Compensation Law the better rule is that the intention of the parties should be the determining factor in deciding which law should apply, explaining that the court should examine all the facts and circumstances of the case with reference to the nature of the work, the place of performance, the domicile of the parties,

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[24]19 La. App. 494, 136 So. 112 (1931).
[25]Durrett v. Eicher-Woodland Lumber Co., 19 La. App. 504, 140 So. 867 (1932).
[26]146 So. 690 (La. App. 1933).
[27]155 So. 484 (La. App. 1934).
[28]*Id.* at 486.
[29]199 So. 175 (La. App. 1940).

etc., all with a view of discovering the true intent.[30] If it should appear that they intended that their rights and obligations should be governed by the laws of the place of performance then the court should not hesitate to apply that law to the case.[31] Under the facts[32] in the case, the court found that the parties must have intended to be governed by the Louisiana law, and applied the Louisiana Compensation Act.

Thus the Louisiana court has discarded both the tort[33] and the contract[34] theory in determining whether the Louisiana Compensation Law should be applied in opposition to the law of another state.[35] The *McKane* case holds that the basis of the determination is the intention of the parties, as evidenced by the facts and circumstances of each case. This holding is in accord with the prevailing modern view that the liability is based on the existence of the status created by employment, being dependent neither upon contract nor tort theories, but only upon the statute creating it.[36]

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[30]This consideration will lead to the same result as the "governmental interest" doctrine explained herein. It is submitted that it is not subjective "intent" that is sought, but rather a consideration of interests in the same light in which they are considered under the "governmental interest" theory.

[31]But see Carl Hagenbeck & G. W. Show Co. v. Randall, 75 Ind. App. 417, 126 N.E. 501 (1920).

[32]Plaintiff's decedent was first hired by defendant company, an Illinois corporation, in Chicago, where it had its principal office and domicile. He was later put in charge of the New Orleans office and settled there permanently. His job was to travel over several states and he was killed in Louisiana while travelling for the company.

[33]It was well settled that the place of injury was unimportant. Selser v. Bragmans Bluff Lumber Co., 146 So. 690 (La. App. 1933); Durrett v. Eicher-Woodland Lumber Co., 19 La. App. 494, 136 So. 112 (1931); Festervand v. Laster, 15 La. App. 159, 130 So. 634 (1930); Hargis v. McWilliams, 9 La. App. 108, 119 So. 88 (1928).

[34]There had been indications that the place of entering into the contract of employment might not be given so much importance. Abood v. Louisiana Oil Refining Corp., 155 So. 484 (La. App. 1934); Durrett v. Eicher-Woodland Lumber Co., 19 La. App. 504, 140 So. 867 (1932).

[35]The court had stated that the action was based on contract, or arose out of the contract of hiring. McKane v. New Amsterdam Casualty Co., 199 So. 175 (La. App. 1940); Dorrieu v. Board of Comm'rs of Port of New Orleans, 158 So. 581 (La. App. 1935); Selser v. Bragmans Bluff Lumber Co., 146 So. 690 (La. App. 1933); White v. Louisiana Western Ry., 174 La. 308, 140 So. 486 (1932); Hargis v. McWilliams Lumber Co., 19 La. App. 494, 136 So. 112 (1931); Legendre v. Barker, 5 La. App. 618 (1927). The law had also been held to be essentially of the nature of insurance against loss or diminution of earning capacity rather than an allowance of damages. See, for example, Carlino v. United States Fidelity & Guaranty Co., 199 So. 228 (La. App. 1940); Barr v. Davis Bros. Lumber Co., 183 La. 1013, 165 So. 185 (1936); Hall v. City of Shreveport, 157 La. 589, 102 So. 680 (1925). But the employer is not an insurer of his employees. Nickelberry v. Richie Grocer Co., 200 So. 330 (La. App. 1941).

[36]Brownfield v. Southern Amusement Co., 196 La. 73, 198 So. 656 (1940); Jackson v. Southern Kraft Corp., 183 So. 135 (La. App. 1938); Laurant v. Dendinger, Inc., 11 La. App. 77, 120 So. 246 (1929); Veasey v. Peters, 142 La. 1012, 77 So. 948 (1918); and cases cited in note 4 *supra*.

The view that the right is neither contractual nor tortious, but depends upon the status created by the employment arising out of the act itself, reconciles the former statements and gives them all their proper significance.

In the case of *Norwood v. Lake Bisteneau Oil Co.*,[37] the Supreme Court of Louisiana held that the time set for bringing suit under the Workmen's Compensation Act was a statute of limitation, and did not amount to an absolute bar to the right. But in *White v. Louisiana Western Ry.*, [38] the Supreme Court held that the time requirement was not a statute of limitation, but an absolute bar.

The decision in the *Norwood* case is the only direct holding that the time limit is a statute of limitation, although it is loosely called a statute of prescription in the majority of the cases in which the so called "Plea of Prescription," or time limit, is urged.[39] The decisions subsequent to the *Norwood* case have uniformly held that the time limit is an absolute limit rather than a statute of limitation in all cases where the question has been in issue,[40] and the Mississippi[41] court and the Federal court[42] have followed this ruling.[43]

The Civil Code of Louisiana[44] provides that suit brought against one of several debtors *in solido* interrupts prescription with regard to all. The Compensation Act has been held to create an obligation *in solido* as regards the employer and his insurer for workmen's claims.[45] The Louisiana court has held that with regard to Workmen's Compensation proceedings, an interruption of the time limit as to one such debtor interrupts as to all.[46]

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[37]145 La. 823, 83 So. 25 (1919).

[38]174 La. 308, 140 So. 486 (1932).

[39]See, for example, Carlino v. U. S. Fidelity & Guaranty Co., 199 So. 228 (La. App. 1940); Thompson v. Tarver, 17 La. App. 230, 135 So. 723 (1931); Guderian v. Sterling Sugar & Ry., 151 La. 59, 91 So. 546 (1922).

[40]Ford v. Louisiana & A. Ry., 196 So. 403 (La. App. 1940); Heard v. Receivers of Parker Gravel Co., 194 So. 142 (La. App. 1938); Cooper v. Southern Advance Bag & Paper Co., 185 So. 313 (La. App. 1938); Brister v. Wray-Dickinson Co., 183 La. 562, 164 So. 415 (1935); White v. Louisiana Western Ry., 174 La. 308, 140 So. 486 (1932); Taylor v. Locke, Moore & Co., 164 La. 577, 114 So. 163 (1927); Cuna v. Elton Lumber Co., Ltd., 148 La. 1097, 88 So. 493 (1921). "When a statute creates a right of action, and stipulates the delay within which that right is to be executed, the delay thus fixed is not, properly speaking, one of prescription, but one of peremption. Statutes of prescription merely bar the remedy. Statutes of peremption destroy the cause of action itself. That is to say, after the limit of time expires, the cause of action no longer exists; it is lost." Guillory v. Avoyelles Ry., 104 La. 11, 15, 28 So. 899, 901 (1900).

[41]Orleans Dredging Co. v. Frazie, 179 Miss. 188, 173 So. 431 (1937); Dunn Construction Co. v. Bourne, 172 Miss. 620, 159 So. 841 (1935); Louisville & N. R.R. v. Dixon, 168 Miss. 14, 150 So. 811 (1933).

[42]Ford, Bacon and Davis v. Volentine, 64 F.(2d) 800 (C.C.A. 5th, 1933).

[43]"The court in the Brister case held squarely that said sec. 31 is clearly a statute of peremption. It was as definitely held in Norwood v. Lake Bisteneau Oil Co., that this law 'is a statute of limitation.' In many other cases it has been likewise referred to. For the purposes of the present case, we deem the distinction unimportant." Mitchell v. Sklar, 196 So. 392 (La. App. 1940).

[44]La. Civ. Code Ann. (Dart 1932) art. 2097.

[45]Dodd v. Lakeview Motors, Inc., 149 So. 278 (La. App. 1933).

[46]Myers v. Rothschild, 155 So. 785 (La. App. 1934); Lutz v. Long-Bell Lumber Sales Corp., 153 So. 319 (La. App. 1934); Bernard v. Aetna Ins. Co., 150 So. 305 (La. App. 1933); Dodd v. Lakeview Motors, Inc., 149 So. 278 (La. App. 1933); Zeller v. Louisiana Cypress Lumber Co., 121 So. 780 (La. App. 1938).

It appears that this holding should be explained on the ground that the courts of Louisiana have construed their Compensation Act as incorporating the provisions for interruption of prescription in cases of solidary liability, rather than on the ground that the court has applied, as a purely procedural matter, this statute to the situation of debtors under their Compensation Act.[47] But the Mississippi court has held that the codal interruption of "prescription" with regard to debtors *in solido* under Louisiana Workmen's Compensation Act is procedural and will not be applied in the Mississippi courts.[48] It is submitted that the Mississippi court is inconsistent in this matter, in view of its holdings that it will follow the interpretation of a foreign statute by the courts of the state whose legislature enacted it,[49] and it is to be hoped that the court will re-examine the question when it is again presented to it.[50]

John Becker.

Foreign Statutes of Limitation in the Mississippi Courts

Transitory Actions in General

The general rule in common law courts is that statutes of limitation, subject to exceptions, are procedural; and that in the absence of a statute of the forum changing the rule, the statute of limitations of the forum and not that of the jurisdiction where the right arose will apply.[1]

In Mississippi the operation of this rule has been changed to a certain extent by a borrowing statute.[2] This statute provides that when a cause of action has accrued in a foreign state and is barred by the statute of limi-

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[47]" . . . the suit filed by plaintiff had the *effect* of interrupting prescription as to defendant." Bernard v. Aetna Ins. Co., 150 So. 305, 307 (La. App. 1933), note 44 *supra*. As herein explained, the Louisiana court frequently calls the time limit in the Workmen's Compensation Act "Prescription," although they actually hold it to be "peremptive." See notes 37 and 38 *supra*.

[48]Dunn Construction Co. v. Bourne, 172 Miss. 620, 159 So. 841 (1935).

[49]McArthur v. Maryland Casualty Co., 184 Miss. 663, 186 So. 205, 120 A.L.R. 846 (1939). See also cases cited note 19 *supra*.

[50]For a general discussion of the problem involved in the application of a foreign statute of limitations in Mississippi see Note, Foreign Statutes of Limitation in the Mississippi Courts, this issue, page 619 *infra*.

[1]Walsh v. Meyer, 111 U. S. 31, 4 Sup. Ct. 260, 28 L. ed. 338 (1884); La. & Miss. R.R. Transfer Co. v. Long, 159 Miss. 654, 131 So. 84 (1930); Fisher v. Burk, 123 Miss. 781, 86 So. 300 (1920); Philp v. Hicks, 112 Miss. 581, 73 So. 610 (1917); Wright v. Mordaunt, 77 Miss. 537, 27 So. 640 (1900); Scharff v. Lisso, 63 Miss. 213 (1885); Perkins v. Guy, 55 Miss. 153 (1877); Roper v. Monroe Grocer Co. 171 La. 181, 129 So. 811, 75 A.L.R. 197 (1930). See generally Stumberg, Conflict of Laws (1937) 141; Ailes, *Limitations in Conflict of Laws* (1933) 31 Mich. L. Rev. 474; Notes (1925) 13 Calif. L. Rev. 411, (1935) 35 Col. L. Rev. 762, (1921) 21 Col. L. Rev. 366, (1931) 79 U. of Pa. L. Rev. 1121.

[2]Miss. Code Ann. (1930) § 2311. "When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state."

tations of such foreign state, or any state where the defendant has resided before residing in Mississippi, then such action shall be barred in Mississippi. It is to be noted that this statute probably does not make the foreign statute substantive but merely makes it a part of the local procedure by incorporation. It has been construed to apply only when the defendant has become a resident of Mississippi after the bar accrued, and consequently is not available to a corporation continuously a resident both of the forum and of the place where the action arose;[3] nor is it available to one who has not come into the state and become a resident thereof.[4]

In *Louisville & N. R.R. v. Poole,*[5] the court held that a corporation could not avail itself of the statute of limitations of another state under this section by simply pleading that it was a resident of that other state, without also pleading non-residence of this state during the period pleaded as a bar, since a corporation, for some purpose, may be a resident of more than one state.

The general rule that statutes of limitation are procedural and that only the statute of the forum is to be considered is further limited by judicial decisions which hold that if the statute of limitations of the state in which the cause of action arose is a limitation upon the right of action as well as upon the remedy it may successfully be invoked as a bar in whatever state the action may be brought.[6]

Thus, in *Louisville & N. R.R. v. Dixon,*[7] an administratrix sued in the Circuit Court of Hancock County for the death of her husband who was killed in Louisiana on July 19, 1924. Suit was filed on July 18, 1925 under the Louisiana Workmen's Compensation Act, and this suit was dismissed by the circuit court because the court was of the opinion that it was without the necessary machinery to enforce the Louisiana Act. Within one year thereafter it was decided by the Mississippi Supreme Court that the chancery court could entertain suits brought under this act,[8] and the complainant thereupon filed a new suit in chancery under the Louisiana Workmen's Compensation Act. The defendant contended that the cause of action had become extinct since Section 31 of the Louisiana Workmen's Compensation Act of 1914 allowed only one year after the injury or death in which to bring the suit. The chancellor overruled the defendant's contention and held for the complainant. The Supreme Court reversed the decision of the chancellor, holding that this statute created a right which

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[3]New O. G. & N. R.R. v. Fortenberry, 107 Miss. 79, 64 So. 966 (1914); Louisville & N. R.R. v. Poole, 72 Miss. 487, 16 So. 753 (1895).

[4]Louisiana & Miss. R.R. Transfer Co., v. Long, 159 Miss. 654, 131 So. 84 (1930), cited note 1 *supra;* Robinson v. Moore, 76 Miss. 89, 23 So. 631 (1898).

[5]72 Miss. 487, 16 So. 753 (1895).

[6]Ford, Bacon, & Davis, Inc., v. Volentine, 64 F.(2d) 800 (S. D. Miss. 1933); Monsour v. Farris, 181 Miss. 803, 181 So. 326 (1938); Dunn Const. Co. v. Bourne, 172 Miss. 620, 159 So. 841 (1935); Louisville & N. R.R. v. Dixon, 168 Miss. 14, 150 So. 811 (1933); Perkins v. Guy, 55 Miss. 153 (1877); Christilly v. Warner, 87 Conn. 461, 88 Atl. 711, 51 L.R.A. (N.S.) 415 (1913); Berkley v. Tootle, 163 Mo. 584, 63 S.W. 681, 85 Am. St. Rep. 587 (1901).

[7]168 Miss. 14, 150 So. 811 (1933).

[8]Floyd v. Vicksburg Co-operage Co., 156 Miss. 567, 126 So. 395 (1930).

did not exist at common law, and that since the same statute fixed the time within which an action thereon might be begun, the time so fixed was not a mere statute of limitations, but an integral part of the right thus created. The court said it was a substantive condition, so that, after the expiration of the time fixed in the statute, the right to institute the action thereunder became extinct, not only in the state which created the right, but everywhere else. The court went further and said that Section 2314 of the Mississippi Code of 1930 (which permits a new action to be brought upon the same cause within one year after the original suit, where the original suit was brought within the period described by the statute and defeated for reasons other than the merits) would not apply. It said that this was merely a statute of limitation and could not be made applicable to keep alive a cause of action where the period prescribed is a substantive portion of the right created, as in this case.

The case of *Dunn Construction Co. v. Bourne*[9] presented a most unusual situation. In that case, the complainant filed suit in the Chancery Court of Pearl River County directly against the insurer of the employer, as is allowed by statute in Louisiana.[10] This suit was filed within twelve months after the cause of action accrued. The suit was transferred to the federal court and remanded by it to the chancery court. In the meantime the insurer had become insolvent and Bourne filed his supplemental bill against the Dunn Construction Co., the employer, this supplemental bill being filed more than twelve months after the cause of action accrued. The chancellor gave a decree in favor of Bourne based on a statute of Louisiana which provided that a suit brought against one of the debtors *in solido* interrupts prescription with regard to all.[11] The Supreme Court reversed the chancellor's decision and held that this statute is one of procedure, and that Mississippi would apply its own procedural law which, in this instance is that suit against one of several persons liable *in solido* does not interrupt limitation statutes as against the others not so sued.[12] Therefore, since the suit was filed more than twelve months after the cause of action accrued, the court held that the action would not lie since the provision of the Louisiana Workmen's Compensation Act, requiring the suit to be filed within twelve months after the cause of action accrued, is substantive and will be applied by Mississippi courts.

There are grounds for contending that the court was not consistent in this decision. In Louisiana the rule that interruption of prescription as to one co-debtor *in solido* interrupts prescription as to all is applied to the Louisiana Workmen's Compensation Act.[13] If the Mississippi court will

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[9]172 Miss. 620, 159 So. 841 (1935).

[10]La. Acts 1930, No. 55, *amending,* La. Acts 1918, No. 253; La. Const. (1921) Art. 7, § 29.

[11]La. Civ. Code Ann. (Dart. 1932) Arts. 2097, 3552.

[12]Miss. Code Ann. (1930) § 2320. "In all cases where the interests are joint, one shall not be barred because another jointly interested is, but the statute of limitations provided in this chapter shall be severally applied, and not jointly, to the right of actions, in whatever cause, pertaining to each of all the parties, though jointly interested." See Case Comment, this issue, page 645 *infra.*

[13]Dodd v. Lakeview Motors, Inc., 149 So. 278 (La. App. 1933).

apply the Louisiana prescription period, as set out in the Louisiana Workmen's Compensation Act, it should read into that provision all the constructions and qualifications which are placed on it by the Louisiana courts and statutes. It seems that it should, as near as possible, apply the statute in the same manner as it is applied by the Louisiana courts.[14]

It is clear that the Mississippi court will apply the foreign statutes of limitation when they are held to be substantive rather than procedural.[15] This raises a difficult question: How may it be determined whether the court will hold a given statute to be one of substance or one of procedure? It seems to be the settled rule in Mississippi that in determining whether a statute is one of substance or procedure the court will look to the decisions of the foreign state concerned construing its own statute of limitations as substantive or procedural.[16] An illustration of the length to which the court will go in following the foreign decisions in determining whether a statute is one of substance or procedure is provided by *Traveler's Insurance Co. v. Inman.*[17] In that case the court held that the elapse of the period of one year before the bringing of suit in Mississippi under the Louisiana Workmen's Compensation Act would extinguish the right to recover under that act. Upon suggestion of error in that case the court's attention was called to the opinion of the Louisiana court in *Norwood v. Lake Bisteneau Oil Co.*,[18] in which that court said that the period prescribed in the Louisiana Workmen's Compensation Act was "a statute of limitation or prescription *liberandi causa*;" and the Supreme Court thereupon withdrew its decision on that point, and disposed of the suggestion of error on other grounds.[19] Subsequently the Louisiana court has held that the period of one year prescribed in their Workmen's Compensation Act is not a mere statute of limitations, but that it is a matter of substance and an integral part of the statute giving the right.[20] Since that decision Mississippi has repeatedly held that the twelve months prescription period of the Louisiana Workmen's Compensation Act is a matter of substance and will be applied as such.[21]

A further indication of the danger of the Mississippi court's accepting the verbal classification of the statute as to whether it is substantive or procedural is found in the case of *McArthur v. Maryland Casualty Co.*[22] This was a case where the court held that a Louisiana statute, allow-

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[14]See Note, *Application of the Louisiana Workmen's Compensation Law in Mississippi,* this issue, page 612 *supra.*

[15]See cases cited in note 6 *supra.*

[16]McArthur v. Maryland Casualty Co., 184 Miss. 663, 186 So. 305 (1939); Dunn Const. Co. v. Bourne, 172 Miss. 620, 159 So. 841 (1935); Louisville & N. R.R. v. Dixon, 168 Miss. 14, 150 So. 811 (1933); Botanico Medical College v. Atchinson, 41 Miss. 188 (1866); McIntyre v. Ingraham, 35 Miss. 25 (1858).

[17]138 So. 339 (Miss. 1931).

[18]145 La. 823, 83 So. 25 (1918).

[19]Traveler's Ins. Co. v. Inman, 147 So. 663 (Miss. 1933).

[20]White v. Louisiana W. Ry., 174 La. 308, 140 So. 486 (1932).

[21]Monsour v. Farris, 181 Miss. 803, 181 So. 326 (1938); Dunn Const. Co. v. Bourne, 172 Miss. 620, 159 So. 841 (1935); Louisville & N. R.R. v. Dixon, 168 Miss. 14, 150 So. 811 (1933).

[22]184 Miss. 663, 186 So. 305 (1939).

ing an action by an injured employee to be brought directly against the insurer of the employer,[23] was procedural since it had been so construed by the Louisiana Court.[24] It made no difference to the Mississippi court that in the decisions of the Louisiana court, construing this statute to be procedural, no conflict of laws question was involved, but only the constitutionality of the retroactive character of the act.

Actions on Foreign Judgments

As to the limitation of actions brought on foreign judgments, it seems clear that the Mississippi statute will be applied to determine the period of limitations on actions on foreign judgments. The statute provides that all actions founded on any foreign judgment must be brought within seven years after the judgment was rendered,[25] but if the judgment debtor was a resident of the state at the time of the institution of the action in which the foreign judgment was rendered, then action on the judgment must be brought within three years after the judgment was rendered.[26]

Adverse Possession

Another exception to the general rule that the statute of limitations of the forum governs is found in cases concerning the adverse possession of property. The rule which prevails in this country concerning this problem seems to be that the statute of limitations of the state where the property is located will govern, this being true in cases of both real and personal property.[27]

The Mississippi court has held that although the statute of limitations of one state is not, as a general rule, technically pleadable in another, yet where such statute not only bars the remedy but vests the title to the property in the possessor, such title so acquired will be recognized and protected in every other state.[28] While it is true that the Mississippi cases have all concerned personal property, it seems clear that the same rule will govern cases concerning adverse possession of real property.

In conclusion it may be said that Mississippi courts will apply the Mississippi statutes of limitation in conflict of laws questions with three exceptions: (1) Cases falling within the provisions of Section 2311 of the Mississippi Code of 1930, in which case Mississippi borrows the foreign procedural statute and incorporates it into its own procedure; or

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[23]La. Acts 1930, No. 55, *amending*, La. Acts 1918, No. 253.

[24]Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., 18 La. App. 725, 138 So. 183 (1931).

[25]This statute is probably subject to the provisions of Miss. Code Ann. (1930) § 2311.

[26]Miss. Code Ann. (1930) § 2304; Bossick v. Skermetti, 146 Miss. 491, 112 So. 385 (1927); Gray v. Valley, 136 Miss. 886, 101 So. 855 (1924); Marx v. Logue, 71 Miss. 965, 15 So. 890 (1894); Kenard v. Alston, 62 Miss. 763 (1885); Boyd v. Barrenger, 23 Miss. 269 (1852).

[27]Brown v. Brown, 5 Ala. 508 (1843); Wynn v. Lee, 5 Ga. 217 (1848); Gehman v. Lair, 35 N. M. 17, 288 Pac. 604 (1930); Waters v. Barton, 41 Tenn. 450 (1866).

[28]Fears v. Sykes, 35 Miss. 633 (1858); Hamilton v. Cooper, 1 Walk. 542, 12 Am. Dec. 588 (Miss. 1832).

(2) cases where the foreign statute of limitation is substantive in that it destroys the right as well as the remedy; or (3) cases which concern the adverse possession of property and the foreign statute not only bars the remedy but vests the title to the property in the possessor.

Wiley Alliston

Rights of Creditors Against the Interest of the Beneficiary of a Trust in Mississippi

In the absence of special provision in the trust instrument or of a statutory provision restraining alienation, the interest of the beneficiary of a trust may be subjected to the payment of his debts.[1] At common law this interest could not be reached by a proceeding at law as it was an equitable interest; therefore it was necessary for a creditor who had obtained a judgment at law against the beneficiary to file a creditor's bill in equity in order to reach his interest under the trust.[2] Statutes in some states have made this equitable interest subject to execution at law.[3]

There are some types of trusts, however, under which a creditor cannot subject the interest of the beneficiary to the payment of his debts either by a proceeding at law or a bill in equity. Among these trusts are spendthrift trusts, trusts for support and discretionary trusts. The courts have failed to draw clear distinctions between these types of trusts because of the similarity of result reached by the use of them.[4]

The spendthrift trust is a trust under which the interest of the beneficiary is due him absolutely and not subject to any discretion in the trustee nor measured by any personal standard, but there is a restraint placed on his power to alienate his interest and on the power of creditors to subject it to the payment of his debts.[5] The true trust for support is one in which the trustee is to pay to the beneficiary the amount which is necessary for his support,[6] but there is another type of support trust in which the income, or a stated sum per year, or the principal, is to be paid to the beneficiary "for his support."[7] The discretionary trust is one in which the trustee is

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[1]Clegg v. Federal Reserve Bank of St. Louis, 169 Miss. 578, 150 So. 812 (1934); Showalter v. Nunnely, 201 Ky. 595, 257 S.W. 1027 (1924); Clarke v. Fay, 205 Mass. 228, 91 N.E. 328 (1910); Griswold, Spendthrift Trusts (1936) § 10; 1 Scott, Trusts (1939) § 147. The Restatement, Trusts (1935) carries the same section numbers as Scott's treatise; no separate citation to the *Restatement* will be made herein.

[2]1 Scott, Trusts (1939) § 147. The general rule is that the creditor must exhaust his remedies at law before equity will give him relief. The Mississippi rule seems to be different. See Miss. Code Ann. (1930) § 407, Clegg v. Federal Reserve Bank of St. Louis, 169 Miss. 578, 150 So. 812 (1934); Calhoun v. Markow, 168 Miss. 556, 151 So. 547 (1933).

[3]1 Scott, Trusts (1939) § 147.

[4]Griswold, Spendthrift Trusts (1936) § 28; 1 Scott, Trusts (1939) § 152.1.

[5]Griswold, Spendthrift Trusts (1936) § 51.

[6]Some cases have held that where the claim is for necessaries that the creditor can reach the interest of the beneficiary under this type of support trust. Cooper v. Carter, 145 Mo. App. 387, 129 S.W. 224 (1910).

[7]Griswold, Spendthrift Trusts (1936) § 430.

given some discretion as to the amount to be paid to the beneficiary or as to whether anything at all is to be paid to him. There are many forms in which the trustee may be given discretion, and a different result will be reached at times, depending on the kind and extent of the discretion of the trustee. In some cases it is held that the discretion is such that the creditors of the beneficiary cannot reach his interest when the beneficiary himself could not force the trustee to pay it to him. But some courts appear to hold that even a slight discretion in the trustee makes the interest of the beneficiary inalienable.[8]

The whole problem of the right of creditors to reach the interest of the beneficiary is complicated in Mississippi by a statute which provides:

"Estates of any kind holden or possessed in trust for another, shall be subject to the like debts and charges of the person to whose use or for whose benefit they are holden or possessed as they would have been subject to it if the person had owned the like interest in the thing holden or possessed as he may own in the uses or trusts thereof, whether the trusts be fully executed or not, and may be sold under execution at law, so as to pass whatever interest the cestui que trust may have. . . ."[9]

This statute is apparently the only expression of legislative will in regard to the liability of the interest of the beneficiary for his debts. Literally interpreted, it would seem to make it impossible to prevent the interest of the beneficiary being subjected to his debts.[10] Has it been so interpreted? Any consideration of its interpretation and effect requires a review of its historical development. The statute was first enacted in 1822 as Section 29 of a long act on conveyancing and first appears in the Code of 1824.[11] It provided as follows:

"Estates of any kind holden or possessed in trust for another, shall be subject to the like debts and charges of the person to whose use, or to whose benefit they were or shall be respectively holden or possessed, as

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[8]GRISWOLD, SPENDTHRIFT TRUSTS (1936) §§ 422-29; 1 SCOTT, TRUSTS (1939) § 155. For a general discussion of all these types of trusts and the problems arising under them see BOGERT, TRUSTS AND TRUSTEES (1935) cc. 11, 13; GRISWOLD, SPENDTHRIFT TRUSTS (1936) *passim;* 1 SCOTT, TRUSTS (1939) c. 6. For a discussion of the policy of allowing them see GRAY, RESTRAINTS ON ALIENATION (2d ed. 1895); and Costigan, *Those Protective Trusts which are Miscalled "Spendthrift Trusts" Reexamined* (1934) 22 CALIF. L. REV. 471.

[9]MISS. CODE ANN. (1930) § 2128. The rest of the section states that under a mortgage or deed of trust the mortgagor or grantor shall be deemed to have the legal title before sale as against everyone but the mortgagee or trustee or their assigns.

[10]Substantially the same statute is in effect in Kentucky, Virginia, West Virginia, Maryland and Ohio. No construction has been given it in Ohio, but there is language in some of the cases to indicate that spendthrift trusts are valid in that state. GRISWOLD, SPENDTHRIFT TRUSTS (1936) § 213. In Kentucky these cases are in confusion, but the prevailing view is that restraints on alienation are valid. *Id.* at §§ 184-186. In Virginia the statute was construed to make restraints on alienation invalid and it was amended to allow such restraints in certain cases. *Id.* at §§ 227-229. The same amendment was adopted in West Virginia, although restraints on alienation had been held valid there before the amendment. *Id.* at §§ 231-232.

[11]MISS. CODE (1824) c. 104, § 29, p. 459.

they would have been subject to, if those persons had owned the like interest in the things holden or possessed, as they own or shall own in the trusts thereof."

In the Act of 1822, this section was immediately preceded by another which provided that the possession of land sold by deed of bargain and sale, lease and release, or covenant to stand seized to uses should be transferred to the bargainee, releasee or person entitled to the use as if he had been enfeoffed.[12] Both of these statutes were brought forward without change until 1857.[13]

This statute was considered in the case of *Presley v. Rodgers*[14] and was there construed to mean that the beneficiary's interest could not be sold under execution at law. The case involved a deed of trust under which the title to slaves was put in a trustee for the use and benefit of a beneficiary for life with provision for a remainderman. The trust was characterized by the court as an active one, and it was stated that the only trusts to which the statute applied were those in which the trustee "has nothing but the naked, dry, legal title, with the whole beneficial interest in the cestui que trust." For this rule the court relied upon two earlier cases[15] which involved the sale under execution at law of an equity of redemption. It was held in these cases that the equity was not subject to sale under execution at law, but no mention was made of the statute in the opinion of either. Both opinions spoke in terms of active trusts.

The language and the holdings of these three cases seem to indicate that the court is thinking of this section and the one immediately preceding it as an attempt to set up something of a Statute of Uses. The language used in the sections is not that of the original English Statute of Uses,[16] but the result attained is similar.[17] Thus these cases indicate that the court

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[12]Miss. Code (1824) c. 104, § 28, p. 459. The exact wording of this section is: "By deed of bargain and sale, or by deeds of lease and release, or by covenant, to stand seized to use, the possession of the bargainor, releasor or covenantor, shall be deemed heretofore to have been, and hereafter to be, transferred to the bargainee, releasee or person entitled to the use, for the estate or interest which such person hath or shall have in the use, as perfectly as if the bargainee, releasee, or person entitled to the use, had been enfeoffed, with livery of seizing of the land intended to be conveyed by such deed or covenant."

[13]Miss. Code (1839) c. 44, §§ 28, 29, p. 304; Miss. Code (1840) c. 34, §§ 28, 29, p. 349; Miss. Code (1848) art. I, c. 42, §§ 28, 29, p. 610.

[14]24 Miss. 520 (1852).

[15]Boarman v. Catlett, 13 Sm. & M. 151 (Miss. 1849); and Wolf v. Dowell, 13 Sm. & M. 103 (Miss. 1849).

[16]27 Hen. VIII, c. 10 (1535).

[17]If this was actually what was attempted by these statutes, they differ from the English Statute of Uses. For example, these sections will not execute a use when there is an enfeoffment to one person for the use of another, while the Statute of Uses would. In addition, there are indications in the language of the Act of 1822 in which these sections are found that it was intended to cover personal as well as real property. In any event the court is treating personal property as coming within the terms of Section 29, as Presley v. Rodgers, 24 Miss. 520 (1852) involves only personality. But see Carradine v. Carradine, 33 Miss. 698 (1857), in which the court apparently thought it was applying the Statute of Uses where the case involved personality.

considers that in the case of a passive trust the interest of the beneficiary will be subject to execution at law whereas the interest of the beneficiary under an active trust will not be subject to execution at law, a result which would be reached by application of the Statute of Uses. This impression is further strengthened by the language used by the court in *Presley v. Rodgers*[18] when it states that this is "a case peculiarly fit for the enforcement of the rule, that a creditor shall seek the aid of a court of equity to subject it [the interest of the beneficiary] to his debt."[19]

If the English Statute of Uses were in effect in the statute as it was interpreted in the *Presley* case would serve no useful function. It seems, therefore, that the court must have considered that the Statute of Uses was not in effect and that this section and the one immediately preceding it in the original act were intended to supply the need for it.[20]

This being the construction placed on the statute by the court in the *Presley* case, it would appear that the legislature proposed to change the meaning and effect of the statute when it changed the wording in 1857 to allow a creditor to subject the beneficiary's interest to his claim at law, "whether the trusts be fully executed or not."[21]

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[18]24 Miss. 520, 526 (1852).

[19]This language shows clearly, as does the language of Boarman v. Catlett, 13 Sm. & M. 151 (Miss. 1849); and Wolf v. Dowell, 13 Sm. & M. 103 (Miss. 1849), that the court considers the interest of the beneficiary to be subject to his debts in a court of equity though the trust is an active one. The only use to which they put the character of the trust (in regard to its active or passive nature) is to determine whether it is subject to execution at law.

[20]There is doubt as to whether the English Statute of Uses could apply in Mississippi today. In the enacting clause of the act which enacted Toulman's Digest [Miss. Ty. Stat. (1816) page 247, § 4] it was provided that no statutes (English or otherwise) not enacted within the Digest should have effect in this state. It is possible that it was not the intention to make the Statute of Uses inapplicable though not enacted. The court apparently thought that it was applying the Statute of Uses in Carradine v. Carradine, 33 Miss. 698, 727 (1857). But is has definitely been held that other English statutes, some of them older than the Statute of Uses, are not in effect in Mississippi. Thus, in Martin v. State, 199 So. 98 (Miss. 1940) dealing with the powers of conservators of the peace, it was said that no English statute "however ancient" was in effect here unless enacted. See, also, Moss Point Lumber Co. v. Board of Supervisors of Harrison County, 89 Miss. 448, 505, 42 So. 290 (1906) (statutes of Marlbridge and Gloucester held inapplicable); Jordan v. Roach, 32 Miss. 481 (1856) (Statute De Donis and Statute of Wills held not in effect); Boarman v. Catlett, 13 Sm. & M. 151 (Miss. 1849) (Statute 5 Geo. II, c. 7 as to sale of lands held not in force); Wheelock v. Couzens, 6 How. 279 (Miss. 1842) (Statutes of Marlbridge; Westminister Second 13 Edw. 1, c. 2; 1 P. & M., c. 12; 11 Geo. II, c. 19; 17 Car. II, c. 7 were stated to be of no force in Mississippi); Kimbrough, Law of Waste in Mississippi Territory and State (1935) 7 Mississippi Law Journal 234, 244.

[21]The complete statute, in its amended form, is as follows: "Estates of any kind, holden or possessed in trust for another, shall be subject to the like debts and charges of the person to whose use, or for whose benefit they are holden or possessed, as they would have been subject to if the person had owned the like interest in the thing holden or possessed, as he may own in the uses or trusts thereof, *whether the trusts be fully executed or not;* and may be sold under execution at law, so as to pass whatever interest the cestui que trust may have; and before a sale under a mortgage, or deed of trust, the mortgagor, or grantor, shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed of

The first case in which the court considered the amended statute was the leading case in Mississippi of *Leigh v. Harrison*.[22] In that case there was a bill in equity filed by a judgment creditor of the beneficiary of a trust in an effort to reach the interest of the beneficiary after execution on the judgment at law had been issued and returned *nulla bona*. The creditor tried to invoke this statute to improve his position. The court stated that since this was a proceeding in equity in which such assets might always have been subjected, nothing was added to his position by invoking it. The court went further and by way of dictum[23] declared that the statute could not apply since this was an active trust and the Statute of Uses did not apply to active trusts.[24] The court did not cite the three earlier cases,[25] but it gave the amended statute the same effect as the earlier statute had been given and completely nullified the effect of the amendment. It gave no indication that it realized that the additional words had been added in 1857.

In the later case of *Stansel v. Hahn*[26] the court held outright that the statute did not apply in cases of active trusts, and that execution at law could not be had.

In both the *Leigh* case and the *Stansel* case, broad, loose language is used which might seem to indicate that no relief will be given even in equity in cases of active trust. This seems to have unduly influenced the court in *Calhoun v. Markow*,[27] where it was apparently held that the two prior cases prevented execution *in equity* on the beneficiary's interest because the trust was active. If this is the law, all active trusts in Mississippi are spendthrift trusts, and there is no need to consult the language in the trust instrument. The amendment of 1857 not only did not affect the statute, but the statute was not even given its original construction. A statute intended to aid creditors and give them more relief was construed to deprive them of all relief. This result is all the more striking when it is realized

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trust, except as against the mortgagee and his assigns, or the trustee, after breach of the condition of such mortgage or deed of trust." (Italics added). MISS. REV. CODE (1857) art. 12, c. 36, § 3, p. 308. This is the section as it appears today.

The preceding section was also amended to read as follows: "By deed of bargain and sale or by deed of lease and release, or by covenant to stand seized to the use, or by deed operating by way of covenant to stand seized to the use, *or in trust, or confidence for another,* the possession . . . " shall be transferred to the bargainee, releasee, or the person entitled to the use. What effect the addition of the italicized words had on the meaning of this statute is not clear. No cases have been found which construed this amended statute, and the phrase "trust or confidence" may have related only to covenants to stand seized to the use or have had independent significance.

[22]69 Miss. 923, 11 So. 604, 18 L. R. A. 49 (1892).

[23]This was dictum in a double sense, as this was a proceeding in equity and the will was apparently construed by the court as setting up a spendthrift trust.

[24]This is some indication that the court considered the English Statute of Uses in effect. For other indications of this nature, see Carradine v. Carradine, 33 Miss. 698, 727-28 (1857).

[25]Presley v. Martin, 24 Miss. 520 (1852); Boarman v. Catlett, 13 Sm. & M. 151 (Miss. 1849); Wolf v. Dowell, 13 Sm. & M. 103 (Miss. 1849).

[26]96 Miss. 616, 50 So. 696 (1910).

[27]168 Miss. 556, 151 So. 547 (1933).

that identical statutes in some other states have been construed to prevent spendthrift trusts altogether.[28]

A literal interpretation of the opinion of the *Calhoun* case makes it appear unreasonable. And this construction is not necessary to reach the actual decision. In the case it happens that the trust instrument set up a real spendthrift trust, though the opinion makes no reference to this fact.

In addition, other cases indicate that creditors can reach the beneficiary's interest in equity when a spendthrift trust is not created. Thus in *Clegg v. Federal Reserve Bank of St. Louis*[29] the creditor was allowed to reach the interest of the beneficiary by a proceeding in equity.[30]

The conclusion as to the statute is that in spite of its wording it must be considered as applying only to passive trusts so that a creditor cannot have execution at law in cases of active trusts. The statute as thus construed is largely ineffective.[31]

There remains for consideration the problem of what relief creditors may have in equity without relying on the statute. It must be concluded that the *Calhoun* case is not controlling and that creditors can get relief in the case of an ordinary trust. But what of spendthrift trusts and the related trusts? Are they allowed?

On this problem, *Leigh v. Harrison*[32] is again the leading case. The will setting up the trust provided that the property was left to Regina Lee "in trust, for the support of my son Thomas during his life, making quarterly payments to him until his death." The court construed this provision to mean that the testator intended that the son's interest should be inalienable and not subject to his debts.[33] The pertinent words in this provision are "for the support," and it was on the construction of these words, together with the supposed intent of the testator as gathered from extrinsic evidence, that the court reached the conclusion that the interest was inalienable.

Generally the courts, in construing instruments in which the word "support" appears, differentiate between those in which the property is left in trust and the trustee is to pay the amount *necessary* for the support

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[28]See note 10 *supra.*

[29]169 Miss. 578, 153 So. 812 (1934).

[30]*Accord:* Merchant's National Bank v. Port Gibson Oil Works, 165 Miss. 314, 141 So. 283 (1932). The *Clegg* case drew a distinction between voluntary and involuntary alienation, and allowed involuntary alienation where the trust instrument forbade voluntary alienation. In doing so it followed Montroy v. Phillips, 134 Miss. 345, 98 So. 775 (1924), which involved the alienation of a legal life estate.

[31]Another possible construction is that there are unexecuted passive uses in Mississippi to which the statute will apply.

[32]69 Miss. 923, 11 So. 604, 18 L. R. A. (1892).

[33]The court allowed extrinsic evidence to be introduced to show the intent of the testator in this regard. From a reading of the will no ambiguity is apparent on its face. This problem is discussed in GRISWOLD, SPENDTHRIFT TRUSTS (1936) §§ 268-70; 4 JONES, EVIDENCE (2d ed. 1926) §§ 1596 *et seq;* 9 WIGMORE, EVIDENCE (3d ed. 1940) c. 88. This case is *contra* to what appears to be the majority rule.

of the beneficiary, and those in which the income, or a fixed amount, is to go to the beneficiary "for his support."[34] In the first situation the interest of the beneficiary is usually held to be inalienable and not subject to his debts; but in the second type the general rule is that creditors may subject his interest to their claims and that it may be voluntarily alienated,[35] the courts considering the statement that it is to be used for his support to be a mere expression of motive and not an attempt to make the interest inalienable.[36]

The language of the will in the *Leigh* case seems to put the case within the second class, but the court did not discuss the fact that there were two classes of support trusts. If the court decided the case on any theory of support trust, this case, in view of the language of the will, is against the great weight of authority and what appears to be the better rule.[37]

Another possible ground on which the court may have based its decision is the theory of spendthrift trust. There is language in the opinion which is susceptible of this interpretation, as when reference is made to "the unfortunate class called spendthrifts" and to the rule giving effect to trusts for "improvident and spendthrift persons."[38] Considering this as the basis of the decision, the result is also bad. If the language of this will is construed as creating a spendthrift trust, any instrument which uses the word "support" could be held to create such a trust. Following such a construction would often result in enforcing a restraint on alienation when the settlor really intended no such thing and merely meant to give expression to the motive for the establishment of the trust.[39]

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[34]The same problems arise where the principal is to be used to defray the necessary expenses of the beneficiary, but the courts have not been so uniform in their holdings in this situation as they have where only the income is to be used. GRISWOLD, SPENDTHRIFT TRUSTS (1936) § 434.

[35]As to the power of ordinary general creditors to reach this interest in both types of support trusts, see GRISWOLD, SPENDTHRIFT TRUSTS (1936) §§ 430-35.

[36]1 SCOTT, TRUSTS (1939) § 154. See Merchant's National Bank v. Port Gibson Oil Works, 165 Miss. 314, 141 So. 283 (1932) for a distinction between "use and benefit" and "support and maintenance." The court in that case also stated that unless there is some indication on the face of the instrument creating the trust that the interest is to be inalienable, the beneficiary can anticipate the income. It indicates that use of "support and maintenance" will show such an intention.

[37]Yet the court adds to the difficulty of deciding what this case stands for by stating that if the income is more than sufficient to support the beneficiary "such excess would seem to be liable to creditors." This question was not presented to the court, and if use of "support" is merely expressing a motive, it would be doubtful so to hold. See Millsaps v. Shotwell, 76 Miss. 923, 25 So. 359 (1899), and Lesche v. Cutrer, 135 Miss. 469, 99 So. 136 (1924) for an instrument in which a true support was established. The same will was construed in both cases.

[38]This construction has seemingly been put on this case in some of the later cases. Mitchell v. Choctaw Bank, 107 Miss. 314, 322, 65 So. 278 (1914); Stern v. Hampton, 73 Miss. 555, 565, 19 So. 300 (1895). This case is also frequently cited by counsel in their briefs to uphold the validity of spendthrift trusts, which shows that the Bar has at times put this construction on it.

[39]The same result would follow from considering this as a trust for the amount necessary for his support, even though the creditors were allowed to get the excess, because the amount he actually needed would be inalienable.

The later case of *Stern v. Hampton*[40] is to some extent in conflict with the *Leigh* case (if it is assumed that the *Leigh* case was decided on the theory of spendthrift trust) and in line with the general view taken by the courts in cases involving this particular problem. Here the property was left to Mrs. Hampton "in trust, for herself and her five children . . . the rents and profits of which to be appropriated by her for the support, maintenance and education of herself and her said children, or so much thereof as may be necessary for that purpose. . . ." The complainants were judgment creditors of the widow, who supplied necessaries to the widow and children. The children, after they had all reached their majority conveyed their interests to their mother. She gave a deed of trust on the land and shortly thereafter the complainants got their judgment. Complainant contended that the children could not convey their interest during the life of widowhood of the mother, but the court held that since there were no provisions in the will against anticipation or alienation that the children could convey their interests. The court definitely stated that this case did not fall within the principle of spendthrift trusts, although the language of the instrument is practically the same as that of the one involved in *Leigh case*.[41]

The effect of the provision "or so much thereof as may be necessary for that purpose" was not considered. It would have been possible to construe this provision as limiting the interests of the beneficiaries to that amount necessary for their support, maintenance and education, so that their interest would have been inalienable. From the other provisions of the will, which provided for a distribution of the property at stated times and under certain conditions, it seems clear that the testator had no intention so to limit the interest.

In *Calhoun v. Markow*[42] the instrument actually set up a spendthrift trust. In the opinion no mention was made of spendthrift trusts in holding that the interest of the beneficiary could not be reached for her debts, but the court talked in terms of active trusts instead. However, from the facts of the case, it should be good authority for the validity of true spendthrift trusts in Mississippi.

Apparently there are only two cases[43] in Mississippi dealing with discretionary trusts and both of these arose from the same trust instrument. This instrument provided that the trustee was to manage the estate, col-

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[40]73 Miss. 555, 19 So. 300 (1895).

[41]See Cady v. Lincoln, 100 Miss. 765, 57 So. 213 (1911) in which the trust was for "support and maintenance." The property affected by this trust was not involved in the suit, but the court stated that it was "doubtless true" that there was a spendthrift trust in regard to it.

[42]168 Miss. 556, 151 So. 547 (1933); see note 27 *supra*, and accompanying text for further consideration of this case. See also Brickwell v. Lightcap, 115 Miss. 417, 76 So. 489 (1917) for similar provisions in the trust instrument. It was held in that case that the interest of the beneficiary was not such as to make it necessary to join him as a party to a suit to sell the land instead of the personalty to pay the debts of the decedent.

[43]Mitchell v. Choctaw Bank, 107 Miss. 314, 65 So. 278 (1914) and Mitchell v. Gewin, 73 So. 888 (Miss. 1914).

lect the rents and profits and to do with it as he thought best for the beneficiaries.[44] One of these cases was *Mitchell v. Choctaw Bank*[45] in which the bank was a creditor of one of the beneficiaries and filed a bill in chancery to subject his interest to the payment of the debt. The court held for the defendant though it used the term active trust in its opinion, it is clear that the basis of the decision was that this was a discretionary trust as to the income and could not, therefore, be subjected to the payment of the debts of the beneficiary.

There was also a provision in the instrument for a distribution to the children when the youngest child should become twenty-one years of age. The complaint asked the court to direct the payment to it of the amount the beneficiary would be entitled to when the property was divided. This the court refused to do, stating that this interest was "so uncertain, contingent, and speculative as hardly to be the subject for the court's disposition by decree."[46] This would appear to suggest still a further class of cases in which the interest of the beneficiary cannot be reached by creditors.[47]

Everette G. Truly, Jr.

The Mississippi Court And Illegal Contracts in the Conflicts of Laws

When a contract is declared illegal in its execution or performance, the court so deciding either expresses or implies that such execution or performance is against a strong policy of the state whose law governs.[1] The expression usually is that the contract is prohibited by statute, or repugnant to the law or public policy of the state whose law governs. Illegality is not mere invalidity, though courts are not careful in drawing the line in many cases.[2] In addition, a contract is not illegal merely because it is unenforceable at a particular forum; it is possible that a contract, though valid in execution and performance, will not be enforced at a forum because of a very strong public policy of the state of the forum against

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[44]There was also an obligation on the part of the trustee to support the beneficiaries out of the income.

[45]107 Miss. 314, 65 So. 278 (1914). The same question was involved in Mitchell v. Gewin, 73 So. 888 (Miss. 1914).

[46]107 Miss. at 323, 65 So. at 279.

[47]This is definitely contrary to the usual rule where the beneficiary is to get the principal at a later date. 1 Scott, Trusts (1939) § 153.3.

[1]Fidelity & Deposit Co. of Maryland v. Grand Nat. Bank, 2 F. Supp. 666 (E. D. Mo. 1933); Corbin v. Houlehan, 100 Me. 246, 61 Atl. 131, 70 L.R.A. 568 (1905); Duval v. Wellman, 124 N. Y. 156, 26 N.E. 343 (1891).

[2]Nielson v. Donnelly, 110 Misc. 266, 181 N. Y. Supp. 509 (1920); International Harvester Co. v. McAdam, 142 Wis. 114, 124 N.W. 1042, 26 L.R.A. (n.s.) 774 (1910). See Cheshire, Private International Law (2d ed. 1938) 249-50, 276-81; Dicey, Conflict of Laws (5th ed. 1932) 647; Goodrich, Conflict of Laws (1927) § 107; Stumberg, Conflict of Laws (1937) 241; 17 C. J. S. 345, § 16, Gellhorn, *Contracts and Public Policy* (1935) Col. L. Rev. 679; Nutting, *Suggested Limitations of the Public Policy Doctrine* (1935) 19 Minn. L. Rev. 196.

even allowing remedies to parties to that particular type of contract.[3] Thus a "futures" contract or a contract for the sale of intoxicating liquors, wherever made or to be performed, is unenforceable in the courts of Mississippi because of statutes refusing to allow any recovery on such contracts.[4] When the question of legality distinctly arises, courts usually recognize it as such; otherwise, it is treated as any other question of validity or performance.[5]

Validity of contracts, in Mississippi, is generally determined by the law of the place of performance.[6] The law of the place of performance also has been applied to determine capacity, it being considered as a matter of validity.[7] As has been indicated, it is hard to determine in some cases whether the court is treating a question as a matter of validity and applying the rule above stated, or is actually thinking in terms of legality and applying a rule peculiar to that problem. Clearly the distinction should be made. It is the policy of all states to prohibit the execution or performance of certain types of contracts. When it does so, the state is not merely saying that something remains undone, the contract thereby being incomplete as, for example, an oral contract for the sale of land. It is saying that there is an element in the contract which is repugnant to the public policy of the state and therefore illegal. Logically, if a state declares that the making of a particular type of contract is illegal and such a contract is made in that state, the law of that state should govern. And such is the rule as followed generally in Mississippi and all other common-law jurisdictions.[8] This rule, it will be noted, differs from the general rule as to validity in that the intention of the parties is not allowed to control.[9] However, if the public policy against the making of the particular type of contract is not fairly strong, the court will fall back on the rule as to validity, or will develop a rule which is peculiar to the particular type of contract.[10] For example, the rule in usury cases generally is that the law of

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[3]In International Harvester Co. v. McAdam, 142 Wis. 114, 124 N.W. 1042, 26 L.R.A. (N.S.) 774 (1910) the court explained that this is not an exception to the rule that the validity of a contract is referable to the place with reference to which the parties contracted, but that the parties merely are left without remedy.

[4]Miss. Code Ann. (1930) § 1830 (futures contracts); Miss. Code Ann. (1930) § 1973 (intoxicating liquors).

[5]Hart v. Livermore Foundry & Machine Co., 72 Miss. 809, 17 So. 769 (1895). See Stumberg, Conflict of Laws (1937) 213.

[6]Lienkauf Banking Co. v. Haney, 93 Miss. 613, 46 So. 626 (1908); Martin v. Martin, 1 Sm. & M. 176 (Miss. 1843). See 2 Beale, Conflict of Laws (1935) § 332.32.

[7]Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930); Schacklet v. Polk, 51 Miss. 378 (1875).

[8]Scudder v. Chicago Union Nat. Bank, 21 U. S. 406, 23 L. ed. 245 (1875); Partee v. Silliman, 44 Miss. 272 (1870); Ivey v. Lalland, 42 Miss. 444, 97 Am. Dec. 475 (1869); Brown v. Nevitt, 27 Miss. 801 (1854); Stone v. Old Colony St. Ry. 212 Mass. 459, 99 N.E. 218 (1912). See 2 Beale, Conflict of Laws (1935) § 347.2; Dicey, Conflict of Laws (5th ed. 1932) 647 *et seq.*

[9]See Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 Yale L. J. 565, 655, 31 Yale L. J. 53; Taintor, *"Universality" in the Conflict of Laws of Contracts* (1939) 1 La. L. Rev. 695.

[10]Berrien v. Wright, 26 Barb. 208 (N. Y. 1857); Zenatello v. Hammerstein, 231 Pa. 56, 79 Atl. 922 (1911).

the state making the contract legal will govern, if such state has a sufficient connection with the contract. As will be shown later, where there is an attempted "evasion" in a usury case of the law of one of the interested states, the stated rule will not be applied. In cases where the court allows a variation from the general rule as to legality of making, it permits the presumption that contracting parties intend to make legal contracts[11] or finds as a matter of fact that the parties intended to contract with reference to the law of a state under which the contract is legal.

Usury is the subject of the majority of cases in Mississippi in which the question of conflict of laws of illegality of contracts has arisen. In applying the law of the state legalizing the otherwise usurious contract, the court sometimes finds an intention of the parties to contract with reference to the law of the state so legalizing the contract,[12] or presumes that the parties intended to make a legal contract.[13] However, the court has not clearly shown in several of the cases just why it allowed the application of the law of the state legalizing the contract. In the case of *Brown v. Freeland*[14] the court held that the law of the place of making would apply, thereby legalizing the rate of interest charged; it added: "The place of payment can and ought, upon principle, to make no difference." This statement is confusing in the light of the decision in the case of *Robb v. Halsey*[15] which was rendered a few years earlier. There the court considered a note made in Mississippi and payable in Louisiana, the interest charges being usurious by the law of the former but not the latter state. Without comment the court stated that the law of Louisiana "consequently" applied. Apparently the court has attempted to discover the intention of the parties, if shown, or to apply the presumption that the parties intended to make a legal contract where intention is not shown. However, that attempt can be seen only in the results of the cases and not in the reasoning.

In usury cases where the court has held that the law of the state making the contract usurious applied, it has been shown that the parties attempted to evade the governing law by appearing to locate the contract elsewhere,[16] or the court has found from the facts that the intention of the parties was that the law of that state should be applied.[17] The attitude of

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[11]Green v. Northwestern Trust Co., 128 Minn. 30, 150 N.W. 229 (1914). The notes and deed of trust in this case were made in Minnesota, and the notes were payable there. The notes were given for the purchase price of Montana land and the deed of trust given on the land to secure the notes. The rate of interest on the notes being usurious by the law of Minnesota, but not by the law of Montana, the court held that the law of Montana should apply, the presumption being indulged that the law of the state which upholds the transaction is the law intended by the parties.

[12]Castleman v. Canal Bank & Trust Co., 171 Miss. 291, 156 So. 648 (1934); Commercial Bank v. Auze, 72 Miss. 609, 21 So. 754 (1897).

[13]Brown v. Freeland, 34 Miss. 181 (1857); Martin v. Martin, 1 Sm. & M. 176 (Miss. 1843).

[14]34 Miss. 181 (1857).

[15]11 Sm. & M. 140 (Miss. 1848).

[16]Levy & Sons v. Jeffords, 141 Miss. 818, 105 So. 1 (1925); National Mutual Bldg. & Loan Ass'n v. Brahan, 80 Miss. 407, 31 So. 840 (1902); Armistead v. Blythe, 20 So. 298 (Miss. 1896).

[17]Shannon v. Georgia State Bldg. & Loan Ass'n, 78 Miss. 955, 30 So. 51 (1901).

the court, as evidenced by the case of *Shannon v. Georgia State Bldg. & Loan Ass'n,*[18] appears to be that it will declare contracts usurious, if possible to do so under the law of one of the interested states, if it is shown that an imposition is being made on the borrower—especially where the borrower is a citizen of Mississippi. How far the court would go to apply Mississippi usury law to protect borrowers is not certain.[19]

The policy in Mississippi against the making or perfromance of contracts on Sunday within the state is stronger than the policy against usurious contracts. Under the law of the state, if a contract is made in Mississippi on Sunday it is illegal, no matter where it is to be performed;[20] and contracts which call for performance on Sunday in Mississippi just as certainly would be declared illegal. It is believed that the Sunday laws of other states will be as strictly enforced in Mississippi where those laws are properly applicable. The intention of the parties that the law of another state control is not at all considered where the contract is made or to be performed on Sunday in the state, even if under the law of another interested state such a contract is legal. The statute in Mississippi seems to be directed against any kind of commercial transactions carried on in the state on Sunday. Would this policy be strong enough to preclude recovery on a contract made on Sunday in a state where it could legally be so made, if the contract is to be performed on a weekday in this or another state where contracts made on Sunday are illegal? In such a case[21] the Wisconsin court treated the problem as it would any other question of validity, and applied, not the law of the state where the contract was made, but the law of the state where the contract was to be performed, stating that it was the presumed intention of the parties that the state of performance govern the *validity* of the contract. If Mississippi should apply its rule of validity to determine legality in the case, it would—as the Wisconsin court did—necessarily hold the contract illegal, the rule in Mississippi being that the law of the state of performance governs. In this situation it is very apparent that the rules concerning validity and those concerning legality should not

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[18]78 Miss. 955, 30 So. 51 (1901).

[19]It is very doubtful that Mississippi would go as far in its protection of borrowers as the Nebraska court did in the case of Personal Finance Co. v. Gilinsky Fruit Co., 127 Neb. 450, 255 N.W. 450 (1934). In that case an Iowa resident borrowed money in Iowa from an Iowa corporation. The rate of interest was legal by the law of Iowa, but not so by the law of Nebraska. The borrower directed an assignment of his wages received from his employment in Nebraska. The court held that the lender could not recover on the assignment because the enforcement of the contract was contrary to the public policy of Nebraska. No attempt to evade the law of Nebraska was shown, nor did it appear that the borrower was being imposed upon.

[20]Miss. Code Ann. (1930) §§ 1131, 1132; Strouse v. Lanctot, 77 Miss. 675, 27 So. 606 (1900); Hill v. Wilker, 41 Ga. 449, 5 Am. Rep. 540 (1871); Brown v. Browning, 15 R. I. 442, 7 Atl. 403, 2 Am. St. Rep. 908 (1886). The same policy is indicated in the case of Arbuckle v. Reaume, 96 Mich. 243, 55 N.W. 808 (1893) in which the court quoted from Adams v. Hammell, 12 Mich. 378 (1864), as follows: "The statute [prohibiting commercial transactions on Sunday] not only makes it a penal offense [to contract], but takes away the legal capacity of the parties to make a contract on that day."

[21]Brown v. Gates, 120 Wis. 349, 97 N.W. 221 (1903).

be confused. It is believed that Mississippi would apply the law of the place of making[22] since its policy apparently does not extend beyond contracts made or to be performed within the state on Sunday.[23]

By statute, in two classes of contracts Mississippi not only declares making and performance in the state illegal, but it refuses to enforce any obligation arising from such contracts even where made and performed or to be performed in a state or states where making and performance are legal. These two classes are contracts for the sale of intoxicating liquors[24] and contracts dealing in "futures.[25] The statutes involved, of course, indicate a very strong policy against the two evils to which they refer. The doctrine is not that such contracts, made and to be performed in a state or states where legal, are illegal by the law of this state; but rather that Mississippi does not furnish a forum to enforce such contracts. The reason is (or appears to be) that to confine the operation of the statutes to the few contracts which might be made within the state would fall far short of affording a sufficient remedy for the correction of the evils intended to be cured.[26] While the state should go to the constitutional limit to protect the interest of its citizens, the policy behind these two statutes seems to be very harsh when they are used to prevent the recovery of obligations incurred under contracts legal where made and to be performed entirely without the state. There are no cases in this state dealing with the conflict of laws of legality of gambling contracts. However, under the provisions of the statute concerning gambling, betting, *etc.*,[27] the court can and probably will reach the same results as it has in contracts dealing with intoxicating liquors and futures. Since the policy of other states generally is strong against gambling contracts, such an application of this statute would not appear as harsh as in the case of the application of the statutes concerning intoxicating liquors and futures contracts.

The statute concerning gambling, betting, *etc.*, mentioned above goes so far as to provide that judgments obtained in actions to enforce gambling debts or even actions to recover money lent with the knowledge that the borrower intended to use it for gambling, cannot be enforced in the state.

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[22]Assuming that the Mississippi Court would apply the law of the place of making, it is to be hoped that the court would not attempt to protect the state of making against a contract which that state would for any reason declare valid, and *vice versa*. For example, the policy of the place of making might be directed solely to purely domestic contracts and if the contract is to be performed in a place where Sunday contracts are not illegal, the contract would be considered legal by the law of the place of making. On the other hand, it might be that purely domestic Sunday contracts are legal in the place of making but that contracts which are illegal under the contract law of the place of performance are deemed illegal under the law of the place of making.

[23]See McKee v. Jones, 67 Miss. 405, 7 So. 348 (1890), and Stamps v. Frost, 174 Miss. 325, 164 So. 584 (1935). These two cases dealt with contracts made in Louisiana on Sunday to be performed in that state, but the court did not show any hostility against recovery merely because the contracts were made on Sunday.

[24]Miss. Code Ann. (1930) § 1973.

[25]Miss. Code Ann. (1930) § 1830.

[26]Goodman v. Swett, 108 Miss. 224, 66 So. 535 (1914); Lemonius & Co. v. Mayer & Son, 71 Miss. 514, 14 So. 33 (1893).

[27]Miss. Code Ann. (1930) § 1824.

It is to be noted, however, that while the state may refuse to enforce contracts of this nature wherever made or to be performed, it cannot refuse to enforce the judgment of a sister state where the judgment is based on a gambling debt. In the case of *Fauntleroy v. Lum*[28] the Supreme Court of the United States held that to refuse to enforce such a judgment is a violation of the Full Faith and Credit clause of the constitution, even though the court of the sister state had misinterpreted the law of Mississippi in applying the law of the latter state to give judgment.

While no cases have arisen in the state on a contract to commit a crime in another state, or a contract to violate the law of another state, Mississippi probably would follow the general rule[29] and hold that the making of such a contract is illegal by the law of Mississippi. As a matter of comity, so the courts say, the public policy of the forum is opposed to such contracts. This rule is really an exception to the rule governing illegality of performance. Generally, legality of performance of a contract should be, and is, left to the law of the state of performance to determine, since the acts of performance are to be done in that state and no other state can be injured thereby. No state has the authority to declare an act in another state illegal unless the effects of the act touch the forum directly. The exception mentioned above has to do with matters which are so strongly opposed to the policy of the state of performance that the forum, as a courtesy to the state of performance, will not furnish remedies to parties attempting to violate that policy by contract. In cases other than contracts to violate the law of another state or to commit a crime in another state, Mississippi follows the general rule concerning legality of performance. In a case arising in Mississippi where a slave owner contracted with another for the latter to act as his agent in the illegal introduction of a slave into Mississippi for the purpose of selling the slave, the court held that the slave owner could not recover the proceeds of the sale, saying: "If the contract of a foreigner is to be completed in or has reference to its execution in a foreign country, and is repugnant to the laws of that country, he is bound by them."[30]

In conclusion, there is need in Mississippi, as in practically every other state, for a clearer distinction between conflict of laws or legality of contracts and that of validity of contracts. Legality involves questions of public policy of the state; and where that policy is not violated, the courts of the state should be careful not to apply its own laws merely because its policy would have been violated if the contract had been made or had called for performance in the state. There is no reason why the state should not enforce rights arising out of contracts legally made and to be performed merely because such contracts cannot be made or performed legally within the state.

William A. Huff.

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[28]210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039 (1908).

[29]Bluthenthal & Beckhart, Inc. v. Kennedy, 165 N. C. 372, 81 S.E. 337 (1914); Foster v. Driscoll [1929] 1 K. B. 470. See 2 BEALE, CONFLICT OF LAWS (1935) § 347.2.

[30]Wooten v. Miller, 7 Sm. & M. 380 (Miss. 1846).

RECENT DECISIONS

BILLS AND NOTES—ARE WORDS INDICATING STATUS OF PAYEE A CONDITION OF PAYMENT OR DESCRIPTIO PERSONAE?—APPLICATION OF IMPOSTER RULE.

The widow of a deceased war veteran was awarded a pension compensation to be paid by monthly checks as long as she remained the unremarried widow of the veteran. After the widow remarried she received eight of the pension checks, each one made payable to her "as unremarried widow," which she indorsed by her mark to the defendant bank. The defendant indorsed the checks "Prior indorsements guaranteed Peoples-Pittsburgh Trust Company" and received payment from the plaintiff-drawee. Action to recover the payments. HELD: Since the instrument was negotiable and the indorsement did not warrant the legal status of the payee, there can be no recovery. *United States v. Peoples-Pittsburgh Trust Co.*, 34 F. Supp. 230(W.D. Pa. 1940).

If the checks had been held non-negotiable, the result could not have been justified.[1] The court, however, was apparently undisturbed by the possibility that a condition was imposed on the promise by "as unremarried widow," and proceeded without any disposition or even mention of the problem to presume the negotiability of the checks as the predicate for the decision.[2]

There are a number of cases in which a pension check was procured under circumstances similar to those of this case; yet, in no one of them have the courts seriously questioned the negotiable character of the checks.[3] These cases, however, are not necessarily persuasive in regard to the present question; for while the instruments involved contained the usual marginal identification as pension checks, or marginal notation as to the particular pension to which the check was referable, no one of them contained a provision which from its natural import and location on the face of the check was susceptible of interpretation as a condition.

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[1]First Trust Co. v. Matheson, 177 Minn. 268, 246 N.W. 1., 87 A. L. R. 478 (1932).

[2]The court said: "To hold that the banks guaranteeing such checks guarantee that the payee was a widow would probably seriously hamper beneficiaries in getting payment of such checks and *it might affect their negotiability.*" (Italics added.) 34 F. Supp. at 230. There is difficulty in ascertaining exactly what the court meant by "it might affect their negotiability." Certainly, these words did not refer to the inhibition that such a construction would place upon the passing of the instrument through the channels of commerce, for the court had in the prior part of the same sentence established that assertion. If the court was refering to the blank indorsement, it was overly cautious in its conclusions, for this interpretation would impress a conditional promise on every commercial paper. If the reference were made to the guaranty constituted by "all prior indorsements guaranteed," the fact that the words would affect the negotiability of the instrument would not be persuasive of anything in particular; for, certainly, the right of the parties between themselves to restrict or enlarge their contract in regard to the instrument by a common-law warranty of guaranty is not disputed.

[3]Security-First National Bank of Los Angeles v. United States, 103 F.(2d) 188 (C.C.A. 9th, 1939); United States v. Bank of North Wilkesboro, 183 Fed. 759 (C.C.A. 4th, 1910); United States v. Canal Bank & Trust Co., 29 F. Supp. 605 (E. D. La. 1939); United States v. First National Bank & Trust Co. of Oklahoma City, 17 F. Supp. 611 (W. D. Okla. 1936); United States v. Liberty Ins. Bank, 26 F. (2d) 493 (W. D. Ky. 1928); Bank of Italy v. First Bank of Kern, 69 Cal. App. 319, 231 Pac. 44 (1924).

In determining whether or not the paper contains the unconditional promise necessary to its negotiability, the whole paper must be considered; the court should not ignore any word on the face of the instrument.[4] It would not necessarily be a strained construction to attribute to these checks a promise to pay only on condition that the payee named therein was the unremarried widow of the veteran. However, the mere fact that the meaning of the words is equivocal suggests that the court would have a predilection toward maintaining the promise as unconditional and absolute; for the courts are desirous of fostering the unimpeded circulation of commercial paper through the channels of commerce.[5] The test usually applied is the contemplated reaction to the provisions of the paper by any person accustomed in business to handle commercial paper.[6] Thus in the majority of the cases in which the court has held the instrument to contain a conditional promise to pay, the condition has been manifest unequivocally and distinctly present.[7] An analogy drawn from the cases concerning the effect on the paper of the phrase "as per contract" suggests that the words, "as unremarried widow" merely identify, at least to a prospective purchaser, the particular pension fund to which the check is referable.[8] These cases illustrate the emphasis which the courts place upon the location upon the paper of the doubtful words and the ease with which the courts may denominate the phrase a statement of the transaction out of which the instrument arose or may construe the same phrase into the category of a conditional promise.[9]

Of course, the fact that the phrase refers to the transaction out of which the checks arose does not eliminate the problem of whether the promise is qualified, since the phrase "as unremarried widow" may not only refer to the original transac-

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[4]Waddell v. Hanover National, 110 App. Div. 549, 97 N. Y. Supp. 305 (1905); Nickel v. Bradshaw, 94 Ore. 580, 183 Pac. 12 (1919).

[5]Lyncy v. United States, 292 U. S. 571, 54 Sup. Ct. 840, 78 L. ed. 1434 (1933); United States v. Bank of Metropolis, 40 U. S. 377, 10 L. ed. 774 (1841); International Finance Co. v. Northwestern Drug Co., 282 Fed. 920 (D. Minn. 1922); Perth Amboy Trust Co. v. Modern School Ass'n, 8 N. J. Misc. 368, 154 Atl. 418 (1931); Mountjoy Parts Co. v. San Antonio National Bank, 12 S.W.(2d) 609 (Tex. Civ. App. 1928).

[6]International Finance Corp. v. Philadelphia Wholesale Drug Co., 312 Pa. 280, 167 Atl. 790 (1933); C. H. Mountjoy Parts Co. v. San Antonio National Bank, 12 S.W.(2d) 609 (Tex. Civ. App. 1928).

[7]In the following cases the courts held that the provisions of the instruments manifestly qualified the promise to pay: Shufeldt v. Gillilan, 124 Ill. 460, 37 N.E. 879 (1894) ("Payable only if necessary for the payee's support"); Van Zandt v. Hopkins, 151 Ill. 248, 37 N.E. 845 (1894) ("On condition that the payee deliver a certain paper"); Beavers v. Consolidated Oil Co. of Texas, 31 S.E.(2d) 876 (Tex. Civ. App. 1930).

[8]Strand Amusement Co. v. Fox, 205 Ala. 411, 87 So. 332, 14 A. L. R. 1121 (1921); Peoples Bank of Mobile v. Moore, 201 Ala. 411, 78 So. 789 (1918); Critcher v. Ballard, 180 N. C. 111, 104 S.E. 134 (1920) (negotiability of note held not impaired by the fact that it contained a statement of warranty on part of the payee of the goods for the purchase of which the note states it was given); Traders Securities Co. v. Kahil, 107 Pa. Super. 215, 162 Atl. 499 (1932). *Contra:* Cincinnati Brush & Map Mfg. Co. v. Weber, 35 Ohio App. 506, 172 N.E. 568 (1929).

[9]Culbreath v. Guiterman & Co., 217 Ala. 259, 115 So. 303 (1927); Whitney v. Central Trust & Life Savings Bank, 157 La. 249, 102 So. 325 (1924); International Finance Corp. v. Calvert Drug Co., 114 Md. 303, 124 Atl. 891, 33 A. L. R. 1162 (1924); International Finance Corp. v. Philadelphia Wholesale Drug Co., 312 Pa. 280, 167 Atl. 790 (1933), 12 Tex L. Rev. 84.

tion, but may subject the check to the provisions of that transaction.[10] Indeed, the unusual appearance of these words on a pension check indicates this subjective intention on the part of the maker. The probable construction, however, would be that the doubtful words are *descriptio personae,* although the term *descriptio persona* is usually restricted to a description of the office of the payee or a designation of his official title.[11] The result of the use of this device to dispose of the excess luggage would not have been affected by the fact that the *descriptio personae* was a misdescription of the payee, for the misdescription of the payee does not affect the negotiability of the paper.[12]

Although the reasoning of the court might have been more explicit had the court considered in its opinion the question of the negotiability of the checks, there is little doubt that the checks would have been deemed negotiable. Indeed, the cases indicate this probability so manifestly that perhaps the presumption of negotiability without discussion in this case is not highly censurable.[13] Since the use of commercial paper by the Federal Government has become so prevalent, and almost a matter of necessity, the courts have been persistent in the assertion that this commercial paper must be subject to the same restrictions as the commercial paper of any individual.[14] Consequently, the policy of the courts has been to hold federal commercial paper negotiable rather than non-negotiable in the event of an ambiguity.[15] There has been indicated

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[10]Verner v. White, 214 Ala. 550, 108 So. 369 (1926), (1927) 37 YALE L. J. 665; Musta v. Grasjean, 208 Cal. 453, 281 Pac. 1022 (1929). In Lane Co. v. Crum, 291 S.W. 1084 (Tex. Com. App. 1927), the clause referring to the engendering transaction was held to be more than a mere statement of the transaction to which the instrument was referable.

[11]Gordon v. Anderson, 83 Iowa 224, 49 N.W. 86, 12 L. R. A. 483 (1931) (instrument payable to person as trustee held negotiable); Denton National Bank v. Kenny, 116 Md. 24, 81 Atl. 227 (1911) (check payable to "D, attorney" held negotiable, the word attorney being merely *descriptio personae*); National Bank of Commerce v. McLaughlin, 50 R. I. 60, 145 Atl. 16 (1929) (note payable to a person as manager of a company held negotiable).

[12]Atlanta & Lowry National Bank v. First National Bank of Carrolton, 38 Ga. App. 768, 145 S.E. 54 (1928); Dean v. Felton, 124 Ore. 122, 266 Pac. 238 (1928); First Wisconsin National Bank v. Peoples National Bank, 136 Va. 276, 118 S.E. 82, 36 A. L. R. 736 (1923); 1 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1938) 116.

[13]Lynch v. United States, 292 U. S. 571, 54 Sup. Ct. 840, 78 L. ed. 1434 (1933); United States v. Bank of Metropolis, 40 U. S. 377, 10 L. ed. 774 (1841); International Finance Co. v. Northwestern Drug Co., 282 Fed. 920 (D. Minn. 1922); Allenberg v. Rappen & Co., 108 Cal. App. 99, 291 Pac. 281 (1930); Westlake Mercantile Finance Corp. v. Merritt, 204 Cal. 673, 269 Pac. 620, 61 A. L. R. 811 (1928); Mercantile Protection Bureau v. Sprecht, 58 N. D. 239, 225 N.W. 794 (1925). *Contra:* Crum v. Lane, 291 S.W. 1084 (Tex. Com. App. 1927). For an interesting comment criticizing this case see (1928) 37 YALE L. J. 382.

[14]United States v. Guaranty Trust Co., 293 U. S. 340, 55 Sup. Ct. 221, 79 L. ed. 415, 95 A. L. R. 651 (1934); United States v. Priscilla Barker, 25 U. S. 559, 12 Wheat. 588, 6 L. ed. 728 (1827); National Exchange Bank of Providence, 151 Fed. 402 (C.C.A. 1st, 1907).

[15]American Surety Co. of N. Y. v. Federal Reserve Bank of Kansas City, 29 F. Supp. 940 (W. D. Mo. 1939) (every doubt must be resolved in favor of negotiability); Snohomich First National Bank v. Sullivan, 66 Wash. 375, 119 Pac. 820 (1911).

even a tendency to hold federal commercial paper negotiable whenever reasonably possible.[16]

In the instant case the result is satisfactory. The recipient of the pension checks had evidently satisfied the federal agencies as to her right to be placed on the pension rolls, and receive the checks. Certainly, in the absence of an express and manifest warning on the face of the checks it would be unjust to hold the indorsee of the payee responsible for determining the legal status of the payee or her right to be on the pension rolls when an inquiry addressed even to the maker would not have divulged the true facts. A different holding would not only place too heavy a burden on the purchaser, but would make negotiation by the payee of government pension checks difficult and cumbersome. The purpose of the government in issuing pension checks would be partially defeated. The courts have accordingly been explicit in declaring that the duty of impressing a condition on the acceptance of a bill or upon the promise to pay is upon the Federal Government, should the intention be to qualify it, and that every doubt will be resolved in favor of negotiability.[17]

It is generally held that if the drawer of a bill, draft, or check delivers it to an impostor who obtains payment from the drawee or negotiates the instrument, the drawer must, as against the drawee or holder in due course, bear the loss. The impostor, however, must be the very person whom the drawer intended to indorse the instrument and receive payment.[18] When there is a personal delivery of the instrument to the impostor by the drawer, the intention of the maker that the person receiving the instrument should indorse and receive payment is presumed by a large majority of courts.[19] On the other hand, the minority rule is that the instruments delivered to the impostor are payable to a legal personality—the personality with whom the maker thought he was dealing—so that indorsement by the impostor is a forgery, therefore ineffective.[20]

Curiously enough, in cases in which the impostor rule may be invoked to achieve a desired result the courts appear disinclined to discuss or consider the possibility of the wording of the instrument as imposting a condition and rendering it non-nego-

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[16]United States v. Bank of Metropolis, 40 U. S. 377, 10 L. ed. 774 (1841); United States v. Bank of North Wilkesboro, 183 Fed. 759 (C.C.A. 4th, 1910); International Finance Co. v. Northwestern Drug Co., 282 Fed. 920 (D. Minn. 1922).

[17]United States v. Bank of Metropolis, 40 U. S. 377, 10 L. ed. 774 (1841); United States v. Bank of North Wilkesboro, 183 Fed. 759 (C.C.A. 4th, 1910); International Finance Co. v. Northwestern Drug Co., 282 Fed. 920 (D. Minn. 1922).

[18]Boatsman v. Stockman's National Bank, 56 Colo. 295, 139 Pac. 764 (1914); Metzger v. Franklin Bank, 119 Ind. 349, 21 N.E. 973 (1889); Montgomery Garage Co. v. Manufacturer's Liability Ins. Co., 94 N.J.L. 152, 109 Atl. 296, 22 A.L.R. 1124 (1920), 34 HARV. L. REV. 76; First National Bank v. American Exchange Bank, 49 App. Div. 349, 63 N. Y. Supp. 58 (1st Dep't 1900); Land Title and Trust Co. v. Northwestern National Bank, 196 Pa. 230, 46 Atl. 420 (1900).

[19]United States v. National Exchange Bank, 45 Fed. 163 (E. D. Wis. 1891); Boatsman v. Stockman's National Bank, 56 Colo. 295, 139 Pac. 764 (1914); Neyer v. Ind. National Bank, 44 Ind. App. 354, 61 N.E. 596 (1901); Montgomery Garage Co. v. Manufacturer's Liability Ins. Co., 94 N.J.L. 152, 109 Atl. 296, 22 A.L.R. 1124 (1920), 34 HARV. L. REV. 76.

[20]District National Bank of Wash., D. C. v. Wash. Loan & Trust Co., 62 App. D. C. 198, 65 F.(2d) 83 (1933), 23 MICH. L. REV. 402.

tiable.[21] In *Mercantile National Bank v. Silver*[22] the impostor assuming the name of a certain army officer induced the plaintiff bank by misrepresentation through the mail to send him a check payable to the name which he had assumed for the purposes of the fraud. The check was payable to the assumed name, but added to the payee's name were the words, "Lt. Col. Coast Artillery Corps." The check was indorsed by the impostor, negotiated, and finally paid by the defendant drawee bank, at which time it was charged to the plaintiff's account. The court held that the designation of the payee by his official title distinguished the case from other cases of fraudulent impersonation and that the drawee bank was not entitled to charge the plaintiff's account with the amount of the check. The decision was predicated on the ground that the added words indicated to any purchaser that the instrument was issued to a legal personality, a certain Lieutenant Colonel of the Coast Artillery Corps bearing the name assumed by the impostor, and not necessarily to the physical being who may have received the check from the drawer. In *Bank of Italy v. First Bank of Kern*,[23] the check was issued to an impostor, being payable to "E. Smith—being the same person as payee of the original draft." The ruling was that the check showed on its face that the paper was not intended to be payable to a physical being to whom it was delivered but the person referred to in the check, "the same person as payee of the original draft." The court then held in effect that the check was payable to a legal personality.

Obviously, the purpose of these two courts was to limit the impostor rule. They maintain that the words of description or qualification indicate an intention on part of the maker which inhibits the presumption of intention indulged in by the majority view. By this reasoning the courts are able without forsaking the majority view to qualify it; they thus arrive at a result which could not always be gracefully achieved by the approach of questioning the negotiability of the instrument on the grounds of a qualified and conditional promise to pay. Thus, the words, "as unremarried widow", might without any serious difficulty be considered as qualifying the promise; "E. Smith—being the same person as payee of the original draft," is susceptible to similar interpretation; but, the words, "Lt. Col. Coast Artillery Corps," would hardly justify any construction except that of *descriptio personae*.

Nevertheless, this limitation on the impostor rule suggests an inconsistency in reasoning and purpose. This qualification is invoked, of course, in those jurisdictions adhering to the majority view of the impostor rule, for in other jurisdictions the qualification is unnecessary. The purpose of the impostor rule, like most of the other rules of commercial law, is to foster the unimpeded circulation of commercial

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[21]In these fraudulent impersonation cases, the maker or drawer of the instrument may be said to have more than one intent. Among other things he intends to make the instrument payable to the person before him. The courts have almost unanimously held that this is the controlling intent except where the payee is already known to the maker or drawer or was particularly identified in some manner, *e. g.*, by some designation, description, or title. BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW (Beutel's 6th ed. 1938) 354.

[22]148 App. Div. 1, 132 N. Y. Supp. 1017 (1st Dep't 1911), *aff'd*, 210 N. Y 567, 104 N.E. 1134 (1914).

[23]69 Cal. App. 319, 231 Pac. 44 (1924).

paper with as much protection to the parties as the circumstances will permit.[24] Evidently, then, under the majority view of the imposter rule the courts determine that the importance of unimpeded circulation of commercial paper exceeds the importance of complete protection for the maker, especially as the maker placed in the hands of the impostor an apparently negotiable bill or check. Any qualification of this rule in those jurisdictions advocating this policy should pursue the same sort of reasoning. Therefore, the courts should offer more protection to the maker only when he has indicated on the face of the instrument his desire to be protected in such a manner that the probable purchaser will be clearly warned.[25] The same rules of construction would apply in this instance as in determining the nature of a promise to pay in commercial paper.

In view of the above policy it would seem an apparent inconsistency to maintain that the words so faintly indicate a condition, adjunct to the promise to pay, that the courts unanimously attach the interpretation of words *descriptio personae* to them, and then maintain in regard to the same words in the very same instrument that these words indicate to the purchaser an intention of the maker that the instrument is to be paid only on condition that there is an indorsement by the legal personality subjectively contemplated by him. The courts in these cases are in effect holding that in order to foster circulation of commercial paper and protect the public in general, the commercial paper issued to an impostor and negotiated by him will be considered negotiated correctly, unless the provisions by construction indicate a subjective intent on part of the maker to protect himself, the intent being present in the instrument although not manifest enough to warn any probable purchaser.

Had the court in construing the words, "as unremarried widow," determined to follow the two cases discussed above, the ruling probably would have been that the phrase, while not constituting a conditional promise, did constitute an indication that the maker did not intend the instrument to be payable to the person to whom it was delivered but to a legal personality. That personality because of the remarriage of the widow was non-existent at the time of the issuance, so that the check was payable to a non-existent payee, this fact being unknown to the maker. The check could not therefore be a bearer instrument, nor could it be negotiated by anyone.[26] The opinion in the instant case does not indicate that the plaintiff sought

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[24]Missouri P. R.R. v. M. M. Cohn Co., 164 Ark. 335, 261 S.W. 895 (1924), *cert. denied*, 266 U. S. 627, 45 Sup. Ct. 126, 69 L. ed. 476 (1924); Central National Bank v. National Metropolitan Bank, 31 App. D. C. 391, 17 L. R. A. (N.S.) 520 (1908); Hoffman v. American Exchange National Bank, 2 Neb. Unoff. 217, 96 N.W. 112 (1901); Goodfellow v. First National Bank, 71 Wash. 554, 129 Pac. 90 (1913).

[25]United States v. Liberty Ins. Bank, 26 F.(2d) 493 (W. D. Ky. 1928), 77 U. OF PA. L. REV. 411 ("Who is the payee is a question of intent, and while there has been considerable difference of opinion the better view seems to be now that it is the objective intent which controls"); United States v. National Exchange Bank, 45 Fed. 163 (E. D. Wis. 1891); Emporia National Bank v. Shotwell, 25 Kan. 360, 11 Pac. 141 (1886); Hartford v. Greenwich Bank, 157 App. Div. 448, 142 N. Y. Supp. 387 (1st Dep't 1913).

[26]National Exchange Bank of Providence, 151 Fed. 402 (C.C.A. 1st, 1907); United States v. Story, 34 F. Supp. 571 (M. D. Tenn. 1940); United States v. First National Bank, 82 Fed. 410 (D. Kan. 1897); Robertson Banking Co. v. Brashfield, 202 Ala. 167, 79 So. 651 (1918); United Agar Stores Co. v. American Raw Silk Co., 184 App. Div. 217, 171 N. Y. Supp. 480 (1st Dep't 1918), *aff'd*, 229 N. Y. 532, 129 N.E. 904 (1921); Commonwealth v. Globe Indemnity Co., 323 Pa. 261, 185 Atl. 796 (1936), 11 TEMP. L. Q. 269.

a qualification of the impostor rule through this medium but does suggest that the plaintiff attempted the same qualification in an equally indirect manner. The court speaks of "defendant's contracts of guarantee" and asserts that neither contract guaranteed that the payee was a widow. Evidently, the plaintiff had seized upon the peculiar Pennsylvania rule that the warranties of Section 66 of the Uniform Negotiable Instruments Law running to a holder in due course do run to the drawee[27] and endeavored to pack into these warranties a guaranty of the legal status of the payee. This contention is mere quibbling with the impostor rule, for the contention is merely that the holder must on indorsement or presentation for payment guarantee that the person who signed as payee was the legal personality that the maker contemplated and intended signing the instrument. Outside the impersonation cases the contention of the plaintiff would of course be of no consequence even if countenanced.

The court in discussing the effect of the indorsement speaks of the defendant's "contracts of guarantee," and concludes that neither contract warranted the legal status of the payee. While recognizing, then, that the Uniform Negotiable Instruments Law makes no provision for the liability of a guarantor so that the same person may be both indorser and guarantor,[28] the court adhered to the general holding that the express warranty of "prior indorsements" means no more than is implied by every unrestricted indorsement.[29] The defendant's warranty, both under the common-law guarantee and under section 66 of the Uniform Negotiable Instruments Law, was, therefore, only that the indorsement was sufficient to give him title and the right to enforce the payment of the check.[30]

David Waterman

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[27]Real Estate Land Title Trust Co. v. United Security Trust Co., 303 Pa. 273, 154 Atl. 593 (1931); National Union Fire Insurance Co. v. Mellon National Bank, 276 Pa. 212, 119 Atl. 910 (1923); Second National Bank of Pittsburgh v. Guarantee Trust & Safe Deposit Co. of Shamokin, 206 Pa. 616, 56 Atl. 72 (1903); J. D. B.[rannan], *Daniel on Negotiable Instruments: Fifth ed.* (1907) 17 HARV. L. REV. 580-83; Comment (1940) 7 U. OF PITT. L. REV. 51.

[28]Winton v. Sullivan, 104 Colo. 450, 91 P.(2d) 996 (1939); Jaronko v. Czerwinski, 117 Conn. 15, 166 Atl. 328 (1933); Neward Finance Corp. v. Acocella, 115 N.J.L. 338, 180 Atl. 862 (1935).

[29]United States v. Guaranty Trust Co., 293 U. S. 340, 55 Sup. Ct. 221, 79 L. ed. 415 (1934); United States v. National City Bank of N. Y., 28 F. Supp. 144 (S. D. N. Y. 1939).

[30]United States v. Guaranty Trust Co., 293 U. S. 340, 55 Sup. Ct. 221, 79 L. ed. 415 (1934) ("Appellant's express guaranty of prior indorsements adds nothing to its liability."); United States v. Liberty Ins. Bank, 26 F.(2d) 493 (W. D. Ky. 1928) ("All prior indorsements guaranteed simply guaranteed that the indorsement of the name Hattie Price Dunn was the indorsement of the person in the check. It was in no sense a guaranty of her legal status.").

CONFLICT OF LAWS—RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT AGAINST PARTNERSHIP AS LEGAL ENTITY—JUDGMENT "IN SOLIDO" OR "JOINT AND SEVERAL"?

Plaintiff brought a tort action in the District Court of Louisiana against the Finklea Bros. Crop Dusting Corp. and against a partnership doing business under the name of Finklea Bros. for damages to his apiary. The corporation and the partners were domiciled in Mississippi, and the only service of process was upon an agent of both in the parish where the injury occurred. Both appeared in court and contested the suit on the merits, and a judgment *in solido* was taken against the corporation and against the partnership as a legal entity separate and distinct from the individual partners. When plaintiff sued on the Louisiana judgment in Mississippi, the individual partners defended on the ground that plaintiff had failed to get valid service of process on any of them in Louisiana; but the court, after sustaining a motion made by plaintiff to strike the plea of the partners because no judgment was sought against them in their individual capacities, gave a judgment *in solido* against the corporation and against the partnership as such. Defendants appeal, contending that the Louisiana judgment was void because the court failed to acquire jurisdiction over the partners, and plaintiff cross-appeals, complaining that the Mississippi court should have translated the Louisiana language *"in solido"* into the equivalent common-law term "joint and several." *Held:* Affirmed on direct and cross-appeal. The court rejected defendants' appeal because the partnership as such submitted itself to the jurisdiction of the Louisiana court by contesting the suit in the firm name and allowing it to be tried out on the merits, and held that the lower court had made the proper ruling by enforcing the judgment as rendered in Louisiana. The court rejected plaintiff's cross-appeal because it felt that a joint and several judgment against a partnership and another defendant could be construed to mean that the individual partners were jointly and severally liable, and because it was unwilling to enlarge upon the Louisiana judgment, which, as to the partnership, was effective only as against the property used in the business. *Finklea Bros. v. Powell,* 198 So. 293 (Miss. 1940).

Under the civil law of Louisiana, a partnership is considered a legal entity, and the judgment of the Louisiana court against the partnership as such was in complete accord with the law of that state.[1] However, in common law jurisdictions a partnership is not generally recognized as a legal entity[2] and, in the absence of a statute, is never treated as such for jurisdictional purposes.[3] It has been held that a partnership cannot be sued in the association name,[4] and that a judgment against a partnership affects only those individual partners upon whom process was served.[5]

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[1]Brinson v. Monroe Automobile & Supply Co., 180 La. 1064, 158 So. 558, 96 A.L.R. 1206 (1934); Clements v. Luby Oil Co., 15 La. App. 384, 130 So. 851 (1930); Hayes Machinery Co. v. Eastham, 147 La. 347, 84 So. 898 (1920).

[2]Fidelity Phoenix Fire Ins. Co. v. Howard, 182 Miss. 546, 181 So. 846 (1938).

[3]CRANE, PARTNERSHIPS (1938) § 60; Holdoegel, *Jurisdiction Over Partnerships, Nonpartnership Associations, and Joint Debtors* (1926) 11 IOWA L. REV. 193, 195; Magruder and Foster, *Jurisdiction Over Partnerships* (1924) 37 HARV. L. REV. 793, 807.

[4]Lewis v. Cline, 5 So. 112 (Miss. 1888); Blackwell v. Reid, 41 Miss. 102 (1866); Dunham v. Shindler & Co., 17 Ore. 256, 20 Pac. 326 (1889).

[5]Persons v. Oldfield, 101 Miss. 110, 57 So. 417 (1912); Nathanson v. Spitz, 19 R. I. 70, 31 Atl. 690 (1895).

Therefore, as to the partnership, this problem arose in the instant case: Was it proper for the Mississippi court to recognize and enforce the type of judgment rendered by the Louisiana court against the partnership composed of the Finklea brothers?

The authority dealing with the problem is limited, because situations similar to the one in the instant case have rarely arisen in the past. The general problem first arose in suits against partners under joint debtor statutes.[6] The Supreme Court of the United States has held that a judgment under such a statute against partners, one of who was a non-resident not personally served with process, was not entitled to full faith and credit outside the state where it was rendered.[7] The Supreme Court of New York has held that a foreign judgment under such a statute can not be the basis of a suit in that state against any of the joint defendants not personally served with process in the state where the judgment was rendered.[8]

However, a different result was reached in *East Denver Municipal Irrigation District v. Doherty*,[9] a case in which the plaintiff originally brought suit in a Colorado court under a statute which, in addition to allowing service of process on one partner as permitted under the joint debtor statutes, provided that business associates could be sued in the name of the business association.[10] Service of process was had on only one of the partners, and, as in the instant case, the suit was contested in the partnership name and tried out on the merits. Judgment was taken against the partnership, and the plaintiff brought suit on the judgment in the Federal District Court of New York. Although New York had no statute similar to the one in Colorado, the Federal court gave a judgment against the partners which could be satisfied only out of their joint property used in the partnership business.

With respect to the partnerships, the courts in both the *Doherty* case and the instant case stressed the fact that jurisdiction was acquired in the states where the suits were originally brought only because the partnerships contested the suits in the firm names and allowed them to be tried out on the merits; and in both cases the practical effect of the judgments is the same, the plaintiffs being able to reach only the property used in the defendants' respective businesses for the satisfaction

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[6]The original New York statute is typical: "Where joint debtors are sued and one is brought into court on process, he shall answer the plaintiff; and if the judgment shall pass for the plaintiff, he shall have judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court." N. Y. Laws 1788, c. 46, § 23.

[7]D'Arcy v. Ketchum, 52 U. S. 165, 13 L. ed. 648 (1850).

[8]Hoffman v. Wright, 1 App. Div. 514, 37 N. Y. Supp. 262 (1st Dep't 1896).

[9]293 Fed. 804 (S. D. N. Y. 1923). The result in this case has been commended in 1 BEALE, CONFLICT OF LAWS (1935) § 86.1 and Magruder and Foster, *Jurisdiction Over Partnerships* (1924) 37 HARV. L. REV. 793, and is embodied in the RESTATEMENT, CONFLICT OF LAWS (1934) § 86, comment *b*.

[10]"When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; but the judgment in such cases shall bind only the joint property of the associates and the separate property of the party served." COLO. CODE CIV. PROC. ANN. (Mills, 1933) § 14.

of the judgments. However, it appears that there is a vital difference between the judgments rendered in the two cases. In the *Doherty* case the court rendered a judgment *in personam* against the individual partners which was effective only as against partnership property held by them as joint owners,[11] while in the instant case, although the opinion is not entirely clear, the court apparently rendered a judgment against the partnership as a legal entity[12]—a judgment necessarily unknown to Mississippi law.

It seems likely, and the language of both courts so indicates, that the results reached were based more upon what the courts felt was a practical necessity than upon any existing rule of Conflict of Laws;[13] for in each case the court recognized and gave effect to a right, created by a foreign judgment, which was theoretically incapable of being literally enforced under the procedural law of the forum.[14] However, realizing that under New York law there was no procedural machinery available for rendering a judgment against a partnership as an entity, the Federal court gave a judgment which did not amount to a complete departure from the procedural law of New York and which, at the same time, most nearly afforded the plaintiff

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[11]" . . . the practice of allowing actions to be brought against a firm as an entity, and of allowing appearance and litigation by the firm as such entity in such actions, is so meaningless, if it is not to be regarded as subjecting the persons of the partners to the jurisdiction of the court for some purpose, that it seems impossible to reach the result contended for by defendant's counsel. . . . Upon the facts disclosed by the record, the plaintiffs would seem to be entitled to judgments against the defendants [partners] to be enforced only against firm assets." East Denver Municipal Irrigation District v. Doherty, 293 Fed. 804, 808 (S. D. N. Y. 1923).

[12]The language of the Mississippi Circuit Court is "that the plaintiff Chas. E. Powell do have of and recover from the defendants Finklea Bros. Crop Dusting Corporation and J. C. Finklea, J. A. Finklea and Ray Finklea a partnership composing the firm of Finklea Brothers in solido. . . . " Finklea Bros. v. Powell, 198 So. 293, 295 (Miss. 1940). During the trial plaintiff had moved to strike the plea of the partners on the ground that no judgment was being sought against them in their individual capacities, and the circuit court had sustained the motion. *Id.* at 294. The Supreme Court of Mississippi then affirmed the judgment of the circuit court, indicating that it was making no attempt to render a judgment against the partners.

[13]"To allow it [the firm of Henry L. Doherty & Co.] to appear and defend, and then to deprive the plaintiffs, after years of litigation, of the results of decisions in their favor, and to compel them to begin all over in some other jurisdiction, is hardly a tolerable doctrine." East Denver Municipal Irrigation District v. Doherty, 293 Fed. 804, 808 (S. D. N. Y. 1923). "Our jurisprudence and its policy is, therefore, in complete accord with what was said in the Baldwin case [Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522, 51 Sup. Ct. 517, 75 L. ed. 1244 (1930)]: 'Public policy dictates that there can be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case, and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.' " Finklea Bros. v. Powell, 198 So. 293, 295 (Miss. 1940).

[14]In the case of Slater v. Mexican Nat. Ry., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900 (1903), the United States Supreme Court held that the Federal District Court of Texas, lacking the procedural machinery for awarding the plaintiff the relief to which he was entitled under a Mexican statute, properly refused to enforce the foreign-created right and properly dismissed the case. It is significant to note that in the *Slater* case the relief provided by the Mexican statute was far

the relief to which it was entitled under the Colorado judgment. On the other hand, the Mississippi court not only enforced the foreign-created right, but apparently a type of judgment entirely outside the scope of the procedural law of the state.

Although from the standpoint of social policy the result reached by the Federal court and by the Mississippi court with respect to the partnerships is a desirable one, it would appear that the Mississippi court should have made use of the technique of the Federal court in awarding relief to the plaintiff.

The cross-appeal raised the problem of whether or not the Mississippi court could have translated the civil law term *"in solido"* into the corresponding common law term "joint and several" without changing the effect of the judgment and the ultimate result of the case. When referring to a judgment against two or more defendants, the terms *"in solido"* and "joint and several" appear to have identical meanings.[15]

Since the Mississippi court apparently has rendered a judgment against a partnership as an entity, it seems that there would have been no difference in the effect of a joint and several judgment against the partnership as one defendant and the corporation as the other, and the effect of a judgment *in solido* against the partnership as one defendant and the corporation as the other. It appears that the court could have reached the identical result and at the same time remained within the general scope of its procedural terminology by calling the judgment in the instant case a joint and several judgment.

Therefore, it would appear that possible confusion might have been avoided if the court in the instant case had followed in this connection, also, the technique of the Federal court in the *Doherty* case. The result would then have been a joint and several judgment against the corporation and the partners, collectible only out of the property of the corporation and the property of the partners used in the partnership business.

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broader in scope than the plaintiff could have obtained in a similar action arising in Texas, while in the instant case and the *Doherty* case the relief available under the judgments in the original suit was narrower in scope than the relief the plaintiffs could have obtained had they originally instituted suit in Mississippi and New York respectively and complied with laws of the forum in bringing the defendants into court. It is also significant that in order to have awarded the relief to which the plaintiff was entitled under the Mexican statute, the court in the *Slater* case would have been required to exceed the bounds of its procedural law to a far greater extent than was required of the courts in the instant case and the *Doherty case*.

[15]Breedlove v. Nicolet, 32 U. S. 413, 8 L. ed. 731 (1833); Garland v. Coreil, 17 La. App. 17, 134 So. 297 (1931); La. Civ. Code Ann. (Dart, 1932) Arts. 2091, 2094.

GUARDIAN AND WARD—LIABILITY OF ESTATE FOR ATTORNEY'S SERVICES RENDERED IN ADMINISTRATION OF THE ESTATE.

Testator named his wife in his will as guardian of the person and estate of his minor son during the latter's minority, and trustee thereafter until the child should reach the age of thirty-one years. The wife retained complainant, an attorney, to assist her during the first year in the administration of the estate. After the services had been rendered, the wife refused to pay therefor or to consent to allow the court to fix the fees; and complainant filed suit against her as trustee and against the estate to have his fees declared a charge thereon. HELD: The relationship created by the will was, in effect, nothing more than a statutory guardianship; and attorney's fees in the administration of statutory estates are not a charge upon the estate, but are the personal obligation of the administrator, executor, or guardian and may not be paid out of the estate on the direct petition of the attorney himself. *Hutton v. Gwin,* 195 So. 486 (Miss. 1940).

Many of the papers filed in the course of the administration of the estate were styled as in a testamentary trust, but the court refused to recognize the existence of the relationship of trustee and cestui que trust. The similarity of the relationship of guardian to ward and of trustee to *cestui que trust,* for the purposes of this case, is evidenced by the language of the courts in cases where guardians are termed trustees[1] and by the fact that the general rule as to the power of trustees and guardians to bind the estate by contract is the same.[2]

The statutes pertaining to guardian and ward in Mississippi provide that where a guardian is appointed by order of the court, the appointee must quality by virtue of this order before being entitled to the custody of the property of the ward.[3] A guardian appointed by will must qualify under the will.[4] One difficulty with calling the relationship in the instant case a statutory guardianship results from the fact that the wife qualified under the will and therefore did not conform to the requirements

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[1]12 R.C.L. 1169, § 60, "A guardianship is a trust of the highest and most sacred character," citing Brandau v. Greer, 95 Miss. 100, 48 So. 519, 21 Ann. Cas. 1118 (1909). See also Smith v. Smith, 210 Fed. 947 (D. Mont. 1914); Walker v. Colby Wringer Co., 14 Fed. 517 (E. D. Wis. 1882); Payne v. Stone, 7 Sm. & M. 367 (Miss. 1846); Stude v. Gross, 179 Iowa 785, 162 N.W. 10 (1917); Reynolds v. Garber-Buick Co., 183 Mich. 157, 149 N.W. 985, L.R.A. 1915C 362 (1914); Appeal of Price, 116 Pa. 410, 9 Atl. 956 (1887).

[2]*In re* Bender's Will, 111 App. Div. 23, 97 N. Y. Supp. 171 (3d Dep't 1906). With respect to contracts, the distinctions between the relationship of a guardian to the property of his ward and of a trustee to the corpus of the trust seem nominal rather than real. The reason for the refusal of the court to recognize the relationship in the instant case as a testamentary trust is not clear since a trustee generally can no more bind the estate by contract than can a guardian.

The cases cited by the court in support of its decision appear to treat guardians, trustees, administrators, executors and all types of fiduciaries in an identical manner with respect to this problem. Howell v. Myer, 105 Miss. 771, 63 So. 233 (1913); Stern v. Hampton, 73 Miss. 555, 19 So. 300 (1895); Parham v. Stith, 56 Miss. 465 (1879); Norton v. Phelps, 54 Miss. 466 (1876). The court also refused to term this a "spendthrift trust" although the elements of such a trust are present and the form of words used to settle a spendthrift trust is not important. GRISWOLD, SPENDTHRIFT TRUSTS (1936) 249, § 271. See also, Leigh v. Harrison, 69 Miss. 923, 11 So. 604 (1892); Note, *Rights of Creditors Against the Interest of the Beneficiary of a Trust in Mississippi,* this issue, page 624 supra.

[3]MISS. CODE ANN. (1930) § 1868.

[4]MISS. CODE ANN. (1930) § 1867.

that a statutory guardian must comply with in order to have control of the ward's property. If the testamentary guardianship failed because the powers granted were "substantially"[5] the same as those of a statutory guardian, her status was that of natural guardian of the child; and as such she had no right to control the property of the ward.[6] A testamentary guardian, on the other hand, has control of both the person and property of the ward unless restricted by the terms of the will.[7] According to statute in Mississippi, a statutory guardian has the right to the custody of the ward's property;[8] but it is made clear by a decision of the Mississippi court that, although an appointment of a testamentary guardian may fail as to the person of the child because one of the parents is still alive, the appointment as to the property will not fail, but the appointee under the will takes the property in the capacity of trustee.[9] This decision seems to indicate that the guardian occupies the dual capacity of guardian of the person and trustee of the estate of the ward.

There seem to be at least three possible distinctions between a statutory guardianship and a testamentary guardianship, the first being in the manner in which each is appointed and qualifies. The second difference arises out of the operation of the statute[10] which provides that the statutory guardian shall convey to the ward all of the corpus of his property when the ward reaches the age of twenty-one years, or, being over eighteen years of age, marries. It seems probable that this statute would not operate to defeat the express provisions of a will appointing a testamentary guardian. If, as the court stated, there was a statutory guardianship in the present case, the stated intention of the testator was defeated; for the son married after the death of his father and before he reached the age of twenty-one years, and by the terms of the statute, it was the duty of a statutory guardian to convey to him at that time the corpus of his property. The third possible distinction arises from the decision of the court in *Campbell v. Mansfield*[11] which indicates that the control exercised by a testamentary guardian over the property of his ward is that of trustee of the property.

Giving effect, then, to the decision of the court in the instant case, the existence of a testamentary guardianship will not depend upon the manner in which the appointment is made, but upon the powers granted to the appointee. The appellant cited the case of *Gwin v. Fountain*[12] in support of his appeal. That case recognized the power of a trustee to bind the estate for the payment of attorney's fees where the will empowered him to "incur debts."[13] The will in the instant case provided that the guardian or trustee should have "all necessary and requisite and full authority to rent, operate and sell said real estate"[14] and directed that the construction of *any*

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[5]195 So. at 488.

[6]See 12 R.C.L. 1108, § 8: "Natural guardianship is of the person only. The father or other natural guardian has no right to the custody or control over the estate, real or personal, of the ward, unless conferred on him by statute."

[7]*Id.* at 1111, § 10: "The testamentary guardian, unless limited by the terms of the will, takes control of both the person and estate of the ward." See also 28 C. J. 1128, § 211.

[8]MISS. CODE ANN. (1930) § 1874.

[9]Campbell v. Mansfield, 104 Miss. 533, 61 So. 593, 45 L.R.A. (N.S.) 446 (1913).

[10]MISS. CODE ANN. (1930) § 1892.

[11]Campbell v. Mansfield, 104 Miss. 533, 61 So. 593, 45 L.R.A. (N.S.) 446 (1913).

[12]159 Miss. 619, 126 So. 18 (1930).

[13]*Id.* at 641, 126 So. at 21.

[14]195 So. at 487.

provision of the will be *liberal.* The court might well have construed "full authority" to include the power to incur debts, and brought the case within the operation of *Gwin. v. Fountain.*

Even in cases of a strict statutory guardianship, as well as in cases of true trusts, where the court has said that attorney's fees are not a charge upon the estate but the personal obligations of the guardian, the Mississippi court has recognized two exceptions: (1) where the guardian, administrator, or executor of the estate is insolvent and (2) where he is a non-resident of the state and suit against him would be futile.[15]

There are other important exceptions to the general rule that a guardian or trustee may not bind the estate by contract, one of the most important of which is the rule stipulating that contracts for necessaries for the estate or the ward are binding upon the estate and not solely upon the guardian or trustee personally.[16] In many jurisdictions attorney's fees have been placed in this category.[17] This seems only just, especially where the administration of the estate is subject to the approval of the chancery court and the services of an attorney are reasonably, if not absolutely, necessary to the proper administration of a large estate.

The court might have reached the opposite result in the instant case if it had followed the generally recognized rule that a trustee or guardian may contract without personal liability and bind the estate.[18] Complainant's allegation that the wife expressly agreed that the amount of his fees should be payable out of and a charge on the estate and that he should look thereto for payment was admitted by demurrer. This should be sufficient grounds to bring the case within the operation of the general rule.

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[15]Norton v. Phelps, 54 Miss. 467 (1877).

[16]See Appeal of Price, 116 Pa. 410, 9 Atl. 856, 857 (1887) where the court says: "Certainly claims for necessaries furnished to the guardian for the support of the ward are valid claims against the estate of the ward, *and the right to recover them from the estate cannot depend upon whether the guardian consents or refuses to pay them.*" (Italics added) See also GRISWOLD, SPENDTHRIFT TRUSTS (1936) § 364; 1 SCOTT, TRUSTS (1939) §§ 188.3-188.4; 28 C. J. 1167, § 281, which cites Irvine v. Stevenson, 183 Ky. 305, 209 S.W. 7 (1919); McCoy v. Lane, 66 Neb. 847, 92 N.W. 1010 (1902); and Appeal of Price, *supra.*

[17]Filmore v. Wells, 10 Colo. 228, 15 Pac. 343 (1887); Miller v. Hart, 135 Ind. 201, 34 N.E. 1103 (1893); Irvine v. Stevenson, 183 Ky. 305, 208 S.W. 7 (1919); Sears v. Collie, 148 Ky. 444, 146 S.W. 1117 (1912); Jessup v. Smith, 223 N. Y. 203, 119 N.E. 403 (1918); Appeal of Price, 116 Pa. 410, 9 Atl. 856 (1887). See especially Wilhelm v. Hendrick, 167 Ky. 219, 180 S.W. 516 (1915) in which it was held that the proper method of enforcing an attorney's claim was to bring a suit in equity to subject the ward's property to the payment of a reasonable attorney's fee; and McCoy v. Lane, 66 Neb. 847, 92 N.W. 1010, 1012 (1902) where the court said: " . . . to proceed directly, by filing a claim against the estate . . . seems to us to be more in harmony with our system of procedure and to be better calculated to do justice to all parties."

[18]Jessup v. Smith, 223 N. Y. 203, 119 N.E. 403 (1918); Rothchild v. Kennedy, 86 Or. 566, 169 Pac. 102 (1917). In First Nat'l Bank and Trust Co. of Tulsa v. Bassett, 83 P.(2d) 837, 838, (Okla. 1939), the court said: "So it has been held that where there was no intention on the part of the attorney to look to the guardian for compensation, nor on the part of the guardian to become personally liable therefor, the ward's estate should be charged with such compensation." See also, 2 SCOTT, TRUSTS (1939) 1472, § 262, where it is said:" . . . the trustee is not personally liable if the contract provides that he shall not be personally liable." The

If the services were proper and were rendered in good faith, their cost will ultimately be borne by the estate. The guardian or trustee has a right of reimbursement from the estate which will surely be insisted upon.[19] The estate is "bound" then, but to a person other than the one who renders the services, so that the final result is only a circuitous method by which the estate pays its valid obligations. Where, as here, the court has supervised the rendition of the services, there appears to be very little likelihood that the estate will be injured by the allowance of a proceeding directly against it. A more equitable and expeditious procedure would be first to determine whether or not the estate was benefited by the services, and then, if it found that it was, to allow resort thereto for payment.[20] An indirect way of reaching this result in the future in spite of the decision in the instant case is by a suit brought in equity against both the guardian or trustee and the estate to subject the fiduciary's equity of exoneration to the payment of the debt. A decree might then be rendered ordering the fiduciary to apply the property of the estate to the payment of the claims.[21]

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same authority says further: "There is no doubt that he [the trustee] is not personally liable where it is expressly so provided in the contract . . . or where the third person expressly agrees to look to the trust and not to the trustee personally." *Id.* at 1475. "There is a growing tendency today, however, to regard the trustee as not the owner of the trust estate but the administrator of the trust, even where the rights of third persons are concerned . . . there is a growing feeling that third persons should also, if necessary, be permitted to obtain satisfaction of their claims out of the trust estate." *Id.* at 1471.

[19]Miss. Code Ann. (1930) §§ 1734, 1891.

[20]See Manderson's Appeal, 113 Pa. 631, 6 Atl. 893, 894 (1886) in which the court said: "It was the trust estate, and not the trustee individually, that was benefited by appellant's well directed and successful services; and hence it is both reasonable and just that they should be paid out of the trust fund."

See also Filmore v. Wells, 10 Colo. 228, 15 Pac. 343 (1887), which dealt with the payment of attorney's fees from the estate of the ward where the statute provided for an attorney's lien on property recovered through his services. The language of the court is, nevertheless, pertinent to the question in the instant case: "The services of the plaintiffs added greatly to the value of the ward's estate, without in the least benefiting the guardians, who neither sought nor derived any personal advantage through the suit. In making and continuing the contract of employment with the plaintiffs, the guardians acted solely in their official capacity. There appears to have been no intention either on the part of the plaintiffs to look to the guardians alone for compensation or on the part of the guardian to incur individual liability in connection therewith. This compensation will ultimately become a charge upon the whole of the estate should the right to treat it as a direct and superior charge upon a specific part of the estate be denied. Sustaining the lien avoids circuity of proceedings, as well as increased expense and annoyance; therefore the true interest of the wards themselves like that of all other persons concerned, will be best subserved by recognizing the application of the statute. It is believed that this is a question of first impression in Colorado; and, if the above conclusion can be said to conflict with the position sometimes taken in relation to attorney's charging lien and trust funds, we feel at liberty to recognize the foregoing modification thereof, *sanctioned,* as we think, by reason as well as the statute." (Italics added) 15 Pac. at 348.

[21]2 Scott, Trusts (1939) 1502, § 267: "It would seem therefore that where a liability is properly incurred by the trustee in the administration of the trust, it might well have been held that a suit in equity could be maintained by the creditor to obtain a decree that the trustee apply the trust properly to the discharge of his claim."

On the right of exoneration generally, see Cathcart, *Right of Exoneration,* this issue, page 513 *supra.*

TAX TITLES—EQUITABLE SERVITUDES—DOES A SALE OF LAND FOR TAXES EXTINGUISH EQUITABLE SERVITUDE?

One lot out of a subdivision was sold to the city for city ad valorem taxes, and was not redeemed. The whole subdivision was subject to an equitable servitude which provided that the lots should be used only for residential purposes and fixed the minimum cost for residences erected thereon. Subsequently the lot was conveyed by the city to the plaintiff, the deed containing no limitation or restriction. Plaintiff's application for a permit to build a residential structure costing less than the minimum was denied, and he brought mandamus proceeding to compel the city to issue a building permit. HELD: Mandamus should issue, since the negative limitation was extinguished by valid assessment and valid sale of land in its entirety for taxes. *Jackson v. Ashley,* 199 So. 91 (Miss. 1940).

Generally a tax sale is an *in rem* proceeding, the land as a whole being taxed, and not merely the interest of the taxpayer.[1] In a very few jurisdictions, the sale is *in personam* and only the taxpayer's interest is the subject of assessment and taxation.[2] Mississippi follows the general rule, according to statute.[3]

Under the *in rem* theory, it would seem that all interests of any sort in the land are extinguished, and that a complete new title is created in the purchaser.[4] Thus, where the land is owned by a life tenant and remainderman, the assessment is of all interests and the remainder is cut off by the tax sale.[5] A tax sale also extinguishes a contingent remainder.[6] A possibility of reverter is held to be divested by a valid sale.[7] However, a tax sale for city taxes in Mississippi does not remove the lien of state and county taxes,[8] nor is the lien of a special assessment extinguished.[9]

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[1]See Note (1926) 40 A.L.R. 1523.

[2]McDonald v. Hannah, 51 Fed. 73, 74 (C.C.Wash. 1892), *rev'd on other grounds,* 59 Fed. 977 (C.C.A. 9th, 1894); Thompson v. McCorkle, 136 Ind. 484, 34 N.E. 813 (1893); Government of Philippine Islands v. Adriano, 41 P. I. 112 (1920).

[3]MISS. CODE ANN. (1930) § 3273 provides: " . . . such conveyance [tax sale deed] shall vest in the purchaser a perfect title with the immediate right of possession to the land sold for taxes. . . . "; and Sec. 3120 provides: "And it shall not be necessary to the validity of an assessment, or of a sale of land for taxes, that it shall be assessed to its true owner; but the taxes shall be a charge on the land or thing sold. . . . "

[4]Hefner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747, 8 Sup. Ct. 377, 31 L. ed. 309 (1887).

[5]4 TIFFANY, REAL PROPERTY (3rd ed. 1939) 678, § 1248; 3 COOLEY, TAXATION (4th ed. 1924) 2938, § 1492: "Generally a tax-title divests all interest in the land sold and vests in the grantee an independent and paramount title. Where the whole title is sold it cuts off and diverts estates in remainder or reversion, rent charges, trusts estates, homestead interests, inchoate rights of dower, mortgages and other encumbrances, judgment liens, and even back taxes and tax-titles, unless some provision is made. . . . " See cases there cited.

[6]Hazlip v. Nunnery, 29 So. 821 (Miss. 1901).

[7]Alamogordo Improvement Co. v. Hennessee, 40 N. M. 162, 56 P.(2d) 1127 (1936). See Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.(2d) 792 (1937), 51 HARV. L. REV. 361, 12 WASH. L. REV. 300. See also note 21 *infra.*

[8]Jackson v. Howie, 179 Miss. 251, 175 So. 198 (1937).

[9]Howie v. Panola-Quitman Drainage District, 168 Miss. 387, 151 So. 154 (1933); Union Saving Bank & Trust Co. v. Jackson, 122 Miss. 557, 84 So. 388 (1920).

Separate interests, such as mineral interests,[10] have been held not to be extinguished by a sale of the land for taxes. The statute in Mississippi[11] provides, in the case of separate ownership, for the separate assessment and taxation of "buildings, improvements or structures, mineral, gas, coal, timber or similar interests in real estate, including building permits or reservations . . ." This statute has not been construed with respect to easements appurtenant.

The majority rule appears to be that a tax sale does not free the land sold of the burden of an easement appurtenant to other land,[12] the usual reasoning being that in the assessment of the dominant tenement the value of the easement is taken into consideration,[13] and to hold that the easement is destroyed by a tax sale would be to

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[10]Northern Pac. R.R. v. Musselshell County, 74 Mont. 81, 238 Pac. 872 (1925) (mineral interests separately assessed); Superior Coal Co. v. Musselshell County, 98 Mont. 501, 41 P.(2d) 14 (1935) (mining claims taxed with land); Sims v. Vosburg, 43 N. M. 255, 91 P.(2d) 434 (1939) (mineral rights separately assessed.)

[11]MISS. CODE ANN. (1930) § 3146.

[12]Goven v. Swain, 10 A.(2d) 249 (N. H. 1939); Metropolitan Life Ins. Co. v. McGurk, 15 N. J. Misc. 572, 193 Atl. 696 (C. C. 1937), (1938) 22 Minn. L. Rev. 578, *aff'd,* 119 N.J.L. 47, 197 Atl. 47 (1938); Ehren Realty Co. v. Magna Charta B. & L. Ass'n, 120 N.J.Eq. 136, 184 Atl. 203 (1936); Tax Lien Co. v. Schultze, 213 N. Y. 9, 106 N.E. 751, L.R.A. 1915D 1115, Ann. Cas. 1916C 636 (1914); Jackson v. Smith, 153 App. Div. 724, 138 N. Y. Supp. 654 (1st Dep't 1912), *aff'd,* 213 N. Y. 630, 107 N.E. 1079 (1914); Blenis v. Utica Knitting Co., 73 Misc. 61, 130 N. Y. Supp. 740 (Sup. Ct. 1911), *aff'd,* 149 App. Div. 936, 134 N. Y. Supp. 1126 (4th Dep't 1912), *aff'd,* 210 N. Y. 561, 104 N.E. 1127 (1914), *motion for reargument denied,* 210 N. Y. 614, 104 N.E. 1127 (1914); Harris v. Curtis, 139 App. Div. 393, 124 N. Y. Supp. 263 (3d Dep't 1910); 3 COOLEY, TAXATION (4th ed. 1924) 2944, § 1494: "Ordinarily, a tax sale does not divest easements charged on the property sold. Thus private easements of light, air and access of adjoining owners over the land sought are not extinguished by a tax-sale."

Contra: Hill v. Williams, 104 Md. 594, 65 Atl. 413 (1906) (easement not separately assessed); Harmon v. Gould, 1 Wash.(2d) 1, 94 P.(2d) 749 (1939) (easement, waterway, extinguished; respondent urged that the court followed the minority, and the court answered that separate assessment of easement from servient tenement "would place far too great a burden upon the officers whose duty it is to levy, assess and collect taxes"); Tamblin v. Crowley, 99 Wash. 133, 168 Pac. 982 (1917) (right of way extinguished); Hanson v. Carr, 66 Wash. 81, 118 Pac. 927 (1911) (right of way extinguished; WASH. CODE ANN. (Rem. & Bal. 1910) § 9230, provides that a tax "lien shall have priority to and be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which the land may be charged or be liable"). See also Smith v. Griffin, 14 Colo. 429, 23 Pac. 905 (1890); *cf.* Hunt v. Boston, 183 Mass. 303, 67 N.E. 244 (1903).

It is very possible that an ordinary easement in gross, neither assignable nor inheritable, would be destroyed by a tax sale of the servient land, for the reasons that it is unlikely to be thus subjected to double taxation and that it is of much less dignity than an easement appurtenant. It is to be noted, however, that a commercial easement in gross which is assignable and inheritable [Standard Oil Co. v. Buchi, 72 N.J.Eq. 492, 66 Atl. 427 (1907); Lindenmuth v. Safe Harbor Water Power Corporation, 309 Pa. 58, 153 Atl. 159 (1932)] and is therefore of approximately the same dignity as an easement appurtenant, is not destroyed by such sale. Tide-Water Pipe Co. v. Bell, 280 Pa. 104, 124 Atl. 351, 40 A.L.R. 1516 (1924). The decision in this case leads to the opinion that in Pennsylvania an easement appurtenant is, *a fortiori,* not destroyed by the sale of the servient land for taxes.

[13]State *ex rel.* Koeln v. West Cabanne Improvement Co., 278 Mo. 310, 213 S.W. 25 (1919); Goven v. Swain, 10 A.(2d) 696 (N. H. 1939); Metropolitan Life Ins. Co. v. McGurk, 119 N.J.L. 47, 197 Atl. 47 (1938); Ehren Realty Co. v.

deprive the owner of the easement of property without due process of law.[14] Another basis is that such a holding would have the effect of subjecting the servient tenement to double taxation.[15]

The same difference in authority is evident in cases involving an equitable servitude. The majority hold that the tax sale does not extinguish the servitude.[16] The reasons for such holdings are that a contrary holding would result in double taxa-

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Magna Charta B. & L. Ass'n, 120 N.J.Eq. 136, 184 Atl. 203 (1936); Harris v. Curtis, 139 App. Div. 393, 124 N. Y. Supp. 263 (3d Dep't 1910), *aff'd,* 211 N. Y. 573, 105 N.E. 1085 (1914); *cf.* Bernstein v. Dodik, 129 Cal. App. 454, 18 P.(2d) 983 (1933); Smith v. Smith, 21 Cal. App. 278, 131 Pac. 890 (1913).

Easements and equitable servitudes might be considered in the assessment of the property benefited thereby in Mississippi under MISS. CODE ANN. (1930) § 3145, which provides, " . . . land shall be assessed according to its *true* value, taking into consideration the improvements and timber thereon, the proximity to navigation, to a railroad, to a city, town village, or road, and *any other circumstances that tends to enhance its value.* . . . " This applies to municipal assessment by virtue of Sec. 2580.

[14]Tax Lien Co. v. Schultze, 213 N. Y. 9, 106 N.E. 751, L.R.A. 1915D 1115, Ann. Cas. 1916C 636 (1914); Poetzch v. Mayer, 115 Misc. 422, 189 N. Y. Supp. 695 (Sup. Ct. 1921); Blenis v. Utica Knitting Co., 73 Misc. 61, 130 N. Y. Supp. 740 (Sup. Ct. 1911), *aff'd,* 149 App. Div. 936, 134 N. Y. Supp. 1126 (4th Dep't 1912), *aff'd,* 210 N. Y. 561, 104 N.E. 1127 (1914), *motion for reargument denied,* 210 N. Y. 614, 104 N.E. 1127 (1914).

[15]Jackson v. Smith, 153 App. Div. 724, 138 N. Y. Supp. 654 (1st Dep't 1912), *aff'd,* 213 N. Y. 630, 107 N.E. 1079 (1914).

[16]Schlafly v. Baumann, 341 Mo. 755, 108 S.W.(2d) 363 (1937), (1938) 3 Mo. L. REV. 326; Alamogordo Improvement Co. v. Prendegast, 43 N. M. 245, 91 P.(2d) 428, 122 A.L.R. 1277; Crawford v. Senosky, 128 Ore. 229, 274 Pac. 306 (1929); Lesley v. Morris, 9 Phila. 110 (Pa. 1873).

The statute of Missouri under consideration in Schlafly v. Baumann, *supra,* is MO. STAT. ANN. (1932) § 9957 which provides that "The collector . . . shall execute to the purchaser . . . in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantor an *absolute estate in fee simple.*" (Italics added.) MISS. CODE ANN. (1930) § 3273 provides " . . . such conveyance shall vest in the purchaser a *perfect title* with the immediate right of possession. . . . " (Italics added.) In the principal case, the court said, " . . . the language of our statute as to the effect of a tax sale deed is perhaps as broad and strong as could be employed and not encumbered by any ambiguity, which is not the case in similar statutes of other states which have come under our observation." 199 So. at 92. Is the Mississippi statute more forcefully worded than the Missouri statute?

In Alamogordo Improvement Co. v. Prendegast, *supra,* the court enjoined the defendant from selling liquor in violation of the restrictive covenant, holding that the covenant survived the tax sale, and was enforceable against the purchaser thereat, with full knowledge of the restriction. As to the necessity of "full knowledge," see Blenis v. Utica Knitting Co., 73 Misc. 61, 130 N. Y. Supp. 740, 747 (Sup. Ct. 1911): "All such purchasers took title burdened as the premises were, for if they did not have actual notice of the situation . . . they have had constructive notice as the recording acts clearly apply."

In Crawford v. Senosky, *supra,* the building restriction was enforced although the land had been sold for taxes. The statute, ORE. LAWS (Olson 1920) § 4325, which provides, "Such [tax] liens shall have priority to and be fully paid and satisfied before any and every judgment, mortgage or other lien or claim whatsoever, except the lien for a tax for a subsequent year," was held not to cut off "easements that have been carved out of one property for the benefit of another," although, strictly speaking, an equitable servitude, not an easement, was involved.

tion,[17] and that it cannot be assumed that the legislature intended to destroy or decrease the value of realty holdings of citizens by destroying restrictions "mutually beneficial to individual citizens in increasing the value of such holdings and the state in increasing its revenue from taxation."[18]

Mississippi, however, is not alone in the minority. Iowa follows a similar rule,[19] reasoning that the tax sale conveyed all interest in the land, and that no one was able to withhold any interest in the land from the tax lien and sale. "The rights which other lot owners may have had under the restrictive covenants have nothing exceptional in character from any other interest subservient to the lien of the state."[20]

The courts have distinguished between an equitable servitude and a possibility of reverter; and they hold that while a tax sale extinguishes the possibility of reverter, the equitable servitude survives, and may be enforced.[21] The reasoning is that it is possible to carve out of the same land separate estates which are separately assessed for the purpose of taxation, and that the equitable servitude is appurtenant to other land in the area and is taxable as such, while a possibility of reverter is of a different nature, and not separately taxed.[22] Another reason is that the assessment is of the full market value, which includes the increased value of each lot in the restricted area, among which is the lot sold and whose value was thus increased by the existence of the restriction; while a possibility of reverter is a burden on the property, and such burden or encumbrance is wiped out by the tax sale because of statute.[23] By like reasoning, if, as the majority rule indicates, an easement is not destroyed by a tax sale of the servient land, then, *a fortiori*, an equitable servitude which is beneficial to the land as well as the burden upon it should not be so destroyed.

Both on principle and authority, the majority rule that an equitable servitude is not divested by a tax sale appears to be the better.[24] The policy of the minority tends

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[17]Schlafly v. Baumann, 341 Mo. 755, 108 S.W.(2d) 363 (1937); Alamogordo Improvement Co. v. Prendegast, 43 N. M. 245, 91 P.(2d) 428, 122 A.L.R. 1277 (1939); Crawford v. Senosky, 128 Ore. 229, 274 Pac. 306 (1929).

[18]Schlafly v. Baumann, 341 Mo. 755, 108 S.W.(2d) 363, 368 (1937).

[19]Nedderman v. Des Moines, 211 Iowa 1352, 268 N.W. 36 (1936) (Permit for a building not conforming to the restriction held valid, the restriction being extinguished by the tax sale).

[20]268 N.W. at 38.

[21]Northwestern Improvement Co. v. Lowery, 104 Mont. 289, 66 P.(2d) 792 (1937), 51 HARV. L. REV. 361, 12 WASH. L. REV. 300; Alamogordo Improvement Co. v. Prendergast, 43 N. M. 245, 91 P.(2d) 428, 122 A.L.R. 1277 (1939). The court in the instant case failed to draw this essential distinction. The opinion cited as authority the case of Alamogordo Improvement Co. v. Hennessee, 40 N. M. 162, 56 P.(2d) 1127 (1936), although that case involved a possibility of reverter. No notice was taken of the case of *Alamogordo Improvement Co. v. Prendergast, supra*, a later case decided by the same court distinguishing the *Hennessee* case and holding that an equitable servitude is not extinguished.

[22]Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.(2d) 792 (1937).

[23]Alamogordo Improvement Co. v. Prendergast, 43 N. M. 245, 91 P.(2d) 428, 122 A.L.R. 1277 (1939).

[24]A possible explanation of the principal case is that it may be that the Mississippi Court refuses to recognize equitable servitudes. The opinion concluded: "We have decided the precise question presented to us in the case at bar, eliminating from view all others, including the question of whether or not such negative

to destroy the whole building scheme,[25] or at least to lay it open to grave dangers.[26] The adoption of the minority rule would impose a hardship on the remaining owners of lots in the restricted area, who may be forced to pay the delinquent taxes in order to protect the increased value of their own property. The desirability of equitable restrictions being generally acknowledged, it seems a doubtful policy to allow their destruction by tax sale.

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limitation as we have herein contained continues in perpetuity. This limitation contains no reverter clause. This being true, who if any may enforce it?" 199 So. at 93. This seems to indicate a lack of understanding as to the nature of an equitable servitude, which requires no possibility of reverter. For the distinction between an equitable servitude and a possibility of reverter, see note 21 *supra* and accompanying text. The enforceability of equitable servitudes is very generally recognized. McCLINTOCK, EQUITY (1936) § 120; 4 POMEROY, EQUITY JURISPRUDENCE (2nd ed. 1919) § 1696; 3 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 861; Ames, *Specific Performance For and Against Strangers to a Contract,* (1903) 17 HARV. L. REV. 174, Clark, *Equitable Servitudes* (1917) 16 MICH. L. REV. 90; Pound, *The Progress of the Law* (1920) 33 HARV. L. REV. 813.

[25]The importance of the adoption of the majority rule is demonstrated by the fact that in Schlafly v. Baumann, 341 Mo. 755, 108 S.W.(2d) 363 (1937), three different real estate associations filed briefs as *amici curiae.*

[26]See Stansell v. American Radiator Co., 163 Mich. 528, 128 N.W. 789 (1910) holding that the owner of a servient estate cannot voluntarily allow his land to be sold for taxes, become the purchaser thereof, and thus effect the destruction of an easement with which it is burdened, on the theory that it is his duty to pay the taxes, and his purchase of the land at a tax sale operates only as a discharge of such duty.

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